MAINE REPORTS

140

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 1, 1943 to JUNE 2, 1944

GAIL LAUGHLIN
REPORTER

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HAROLD I. GOSS

SECRETARY OF STATE FOR THE STATE OF MAINE

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PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. GUY H. STURGIS, CHIEF JUSTICE

HON. SIDNEY ST. F. THAXTER

HON. JAMES H. HUDSON

HON. HARRY MANSER

HON. HAROLD H. MURCHIE

HON. ARTHUR CHAPMAN

JUSTICES OF THE SUPERIOR COURT

HON. GEORGE L. EMERY

HON. EDWARD P. MURRAY

HON. ALBERT BELIVEAU

HON. RAYMOND FELLOWS

HON. ROBERT A. CONY

HON. NATHANIEL TOMPKINS

HON. ARTHUR E. SEWALL

ACTIVE RETIRED JUSTICE OF THE SUPERIOR COURT

HON. WILLIAM H. FISHER

ATTORNEY-GENERAL

HON. FRANK I. COWAN

REPORTER OF DECISIONS

GAIL LAUGHLIN

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

EDNA STEVENS *vs.* PERLEY E. FROST.

Androscoggin. Opinion, May 4, 1943.

Directed Verdict. Scope of Employment.
Agency. Burden of Proof.

Whether an employee is acting in the scope of his employment may be a question of fact for a jury or a question of law for the Court.

Whether there is evidence to justify triers of fact to so find is for the Court, and if there be no such evidence it is the duty of the Court to direct a verdict.

Authority of an agent may be ostensible or actual. Ostensible authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. Actual authority may be either express or implied. Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal and it extends only to such powers as the principal gives the agent in direct terms. Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question and includes such incidental authority as is necessary, usual and proper as a means of effectuating the purpose of the employment; and this is so whether an agency is general or special. An employee has implied authority such as is usual, customary and necessary.

The authority of an agent is the very essence of the relationship of principal and agent.

In the instant case, the burden of proving the agency and the scope thereof was upon the plaintiff. It cannot be presumed.

ON EXCEPTIONS.

Action by the plaintiff was for recompense for injuries alleged to have been sustained as a result of the negligence of defendant's employee acting within the scope of his employment. The employee accused of negligence was the son of the defendant and was employed by the defendant in defendant's garage in a more or less general capacity and, in addition, was employed as a salesman, with authority to use of the cars of the garage whenever it was necessary to his employment. He and the plaintiff were on friendly terms and at the employee's request the plaintiff arranged a party at the home of mutual friends at which the employee hoped to acquire information in respect to a possible sale. The plaintiff was driven home from the party by the employee and through the alleged negligence of the driver of the automobile, she received the injuries which constituted the basis of this action. The Court directed a verdict for the defendant. Plaintiff excepted. Exceptions overruled. The case fully appears in the opinion.

Berman & Berman, of Lewiston for the plaintiff.

Robinson & Richardson,

John D. Leddy,

Clifford & Clifford,

Frank T. Powers, for the defendant.

SITTING: STURGIS, C. J. THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The plaintiff claimed to have been injured by the negligence of an employee of the defendant. At the close of the plaintiff's presentation of evidence the defendant rested and moved for a directed verdict in his favor on the ground that the evidence presented would not justify a finding that the

acts, negligent performance of which is complained of, were in the course of the employee's employment. The presiding Justice granted the motion and the plaintiff excepted. There is no other issue before this Court.

Whether an employee is acting in the scope of his employment may be a question of fact for a jury or a question of law for the Court. Whether there is evidence to justify triers of facts to so find is for the Court, and if there be no such evidence, it is the duty of the Court to direct a verdict. 39 C. J., Master and Servant, Sec. 1593; *Zampella* v. *Fitzhenry*, 97 N. J. L., 517, 117 A., 711, 24 A. L. R., 666. This is but an application of the principle that, if only one conclusion is justified, the Court will direct the jury to that conclusion. *Heath* v. *Jaquith*, 68 Me., 433; *Burnham et al.* v. *Hecker*, 139 Me., 327; 30 A. (2d), 801.

The plaintiff was a young woman, friendly with one Chester Frost. They went about more or less together. Frost's father, the defendant, was the proprietor of a garage engaged in repairing, buying and selling automobiles. The son was employed in the garage in a more or less general capacity and, during his father's absence from the garage, was in charge thereof. In addition to this work he was a salesman and had authority to use one of the cars of the garage whenever it was necessary to his employment. As salesman it was within the course of his employment to seek the names of prospective buyers, to contact them and make sales. He did not restrict this work to business hours, but was accustomed to mix business with pleasure and to obtain any available information and to secure customers whenever opportunity offered.

He met, through the plaintiff, a young couple, Mr. and Mrs. Brown, and the four became friendly and were more or less in each other's company. He testified that he learned that Mrs. Brown knew of a person who was interested in the purchase of an automobile and that, for the purpose of ascertaining the name of that person, he asked the plaintiff to arrange a party

at the Browns'. The plaintiff arranged the party, as requested, and Frost purchased and took to the Browns' a spaghetti dinner. The party consisted of the plaintiff, himself and Mr. and Mrs. Brown. The plaintiff was conveyed to the party by young Frost in the automobile of the defendant, which he used in his employment. On direct examination young Frost testified that he obtained the name of the prospect at the party. On cross examination he testified that he did not obtain this name. He also stated that there was talk relative to Brown purchasing a car. After dinner the two couples played cards till some time after midnight, at which time he took the plaintiff to her home in the automobile. Arrived at her residence, the plaintiff alighted and when the car was started by Frost it skidded, struck her and inflicted the injuries complained of.

The plaintiff claimed that her injuries were received by reason of the negligent operation of the car and invokes the principle that the employer is responsible for the negligence of the employee, acting in the course of his employment.

This principle is of such general acceptance that only passing affirmation is necessary. 39 C. J., Master and Servant, Sec. 1446; *Pollard* v. *M. C. R. R. Co.*, 87 Me., 51; 32 A. 735; *Copp* v. *Paradis*, 130 Me., 464, 157 A., 228. The adjudicated cases have dealt with the applicability of the rule. This is the issue in the instant case.

For the plaintiff it is claimed that there is evidence to justify the finding that young Frost caused the party to be held, partly for the purpose of furthering the business in which he was employed by the defendant, namely, to secure the name of the prospective buyer, and that, at the party, he devoted some attention to business and that, inasmuch as he induced the plaintiff to arrange the party and to be present thereat, an essential part of the program was to transport her to the party and to her home when the party was at an end; and the conclusion is drawn that, in so doing, he was acting in the course of his employment.

To reach the conclusion that he was acting in the course of his employment in transporting the plaintiff to her home, it must appear that he had authority to so transport her. "The authority of an agent is the very essence and *sine qua non* of the relationship." 2 Am. Jur., Agency, Sec. 85; *Copp* v. *Paradis*, supra; *Mechanic's Bank* v. *Bank of Columbia*, 5 Wheat., 336, 337, 5 Law Ed., 100. In that case the Court said:

> "But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts,
>
> 1. That the act was done in the exercise, and,
> 2. Within the limits of the powers delegated."

In *Morris* v. *Brown*, 111 N. Y., 318, 327, 18 N. E. 722, 725, 7 Am. St. Rep., 751, the Court said:

> "It is a general proposition that a master is chargeable with the conduct of his servant, only when he acts in the execution of the authority given him."

It is to be borne in mind that the issue before us is not merely whether young Frost was upon his employer's business at the Browns' and, consequently, so acting in driving therefrom. It is true that one who is furnished a car by his employer in which to go to and return from the place where he performs a service for his employer, is still in the course of his employment on his return, and the employer is generally responsible for his negligence during this time. But he is not so responsible to one who is riding in the car at the invitation of the employee if the employee is without authority to transport such person. Mechem on Agency, Sec. 1913; *Driscoll* v. *Scanlon*, 165 Mass., 348, 43 N. E. 100, 52 Am. St. Rep. 523. In that case the Court, commenting on the difference in the relationship between the defendant and a person unauthorized to ride, and between the defendant and a person on the street, said:

"The plaintiff does not stand in the same position as if he had been run over while crossing the road."

It follows that the driver of the Frost car might have been within the scope of his employment at the Browns' and also while driving therefrom, by reason of which the defendant would have been liable for the driver's negligence toward a person whom he met on the highway and, yet, not responsible to the plaintiff riding in the car. *Murphy* v. *Barry*, 264 Mass., 557; 163 N. E. 159; *Bilow* v. *Kaplan*, 164 A., 694, 11 N. J. Misc. 108; *Raible* v. *Hygienic Ice & Refrigerating Co.*, 119 N. Y. S., 138; 134 App. Div. 705; *Wilkinson* v. *Moore & P. Coal Co.*, 79 N. H., 335, 109 A. 45. In the latter case the Court said:

"As the driver had no authority in fact or in law to invite the plaintiff to ride because doing so was not within the scope of his employment, his invitation, if given, was not the invitation of the defendants."

In each of these cases the employee was driving a motor vehicle on the business of his employer and invited the person injured to ride for the purpose of assisting him in the work which he was performing for the employer, and in each case the Court held that the employee did not have authority to employ an assistant and make his employer responsible for negligence to the assistant. Mr. Mechem well says:

"As a general rule, however, it is entirely clear that one agent or servant has, from his mere position as such, no implied authority whatever to employ other agents or servants on his principal's account. What servants or agents the principal shall have (for and *to whom he is to assume responsibility*), how and when they shall be selected, upon what terms and subject to what conditions, limitations or control they shall operate, and the like, are questions of the greatest importance, which the principal

must ordinarily have the right to determine for himself. Unless it can be shown, therefore, that the principal has expressly or by proper implication given the authority to someone else, it must be deemed to reside in him alone." Mechem on Agency, Sec. 1042. (The italicising is ours.)

Adhering to these general principles, does the record justify a finding that the employee was acting within the scope of his authority? We think not. The burden of proof is upon the plaintiff to prove the agency and the scope thereof. It cannot be presumed. 3 C. J. S., Agency, Sec. 315; *Stratton* v. *Todd,* 82 Me., 149, 151; 19 A. 111; *Castner* v. *Richardson,* 18 Col., 496, 33 P. 163; *Schmidt* v. *Shaver,* 196 Ill., 108, 63 N. E., 655, 89 Am. St. Rep. 250; *American Car & Foundry Co.* v. *Alexandria Water Co.,* 221 Pa. State, 529; 70 A. 867, 15 Ann. Cas. 641, 128 Am. St. Rep. 749; *Blacher* v. *National Bank of Baltimore,* 151 Md., 514, 135 A. 383; 49 A. L. R., 1366.

Authority of an agent may be ostensible or actual. Ostensible authority is that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. There is nothing in the record that requires our inquiry in this respect.

Actual authority may be either express or implied. Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms; and the express provisions are controlling where the agency is expressly conferred. 2 C. J. S., Agency, Sec. 97. There is little, if any, testimony of express authority in the record. The employer was questioned directly as to the authority of the employee and allowed to answer. He testified as follows:

"Q. Did or not Chester Frost have your authority to obtain customers at social functions?

"A. Yes, sir.

"Q. Did he or not have your authority to obtain customers at where *he may be visiting at dinner or supper or any place where he might be socially?* (Italicising is ours.)

"A. Yes, sir.

"Q. Did he have your authority to get leads which would introduce him to customers?

"A. Certainly.

"Q. In the evening as well as the day time?

"A. Yes.

"Q. Now, did you know on this day that Mr. Frost, that Chester was going to visit the Brown home that evening?

"A. No, I don't know as I did, in particular.

"Q. And did he—would he or not have your general authority to interview and solicit a prospect, or get a lead?

"A. Why, not in particular. I wouldn't—I say no, he didn't have to have my authority.

"Q. Didn't have to have your specific authority?

"A. No, sir.

"Q. That would come under his general — ?

"A. Yes, general."

These inquiries called for a conclusion, a statement of the witness' opinion and the answer would naturally be predicated not only upon directions given in express terms by the employer to the employee, but also upon inferences drawn from the circumstances connected with the relationship. In other words, the answers were statements of his opinion of the employee's authority, both express and implied. Such testimony is incompetent, whether it comes from a third party, the employer or the employee. A witness is limited to a statement of directions given and of facts and circumstances from which inferences may be drawn by the jury if the evidence is sufficient to raise an issue. *Short Mountain Coal Co.* v. *Hardy*, 114

Mass., 197, 213; *Rice* v. *James*, 193 Mass., 458, 461, 79 N. E. 807; *Farrell* v. *United States*, 110 Fed., 942; *McCornick* v. *Mining & Milling Co.*, 23 Utah, 71, 63 P., 820; *Wilhoit* v. *Iverson Tool Co.*, 119 S. W. (2d), 709 (Tex. Civ. App.).

However, if we disregard the incompetency of this testimony and receive it as a statement of express authority, it does not justify a finding that there was express authority to do the acts in question. It does not refer to furnishing of entertainment, to transportation of others in the automobile or to the employment of an assistant.

Some of the questions asked of Chester Frost, the employee, called for an expression of opinion, but he testified principally as to the nature of his work and what he was accustomed to do, all of which is proper evidence upon which to determine his implied authority. He testified to no express direction. After testifying as to his work in the garage and to the fact that, in the absence of his father, he was in full charge thereof, he was questioned as to his duties as a salesman and testified as follows:

> "Q. Now, as a salesman, what were your duties as a salesman?
>
> "A. Well, I contacted leads, if I had any. Sometimes I would call on the phone. I would get names, if possible, and go out and contact them.
>
> "Q. And whether or not it was a part of your duties to go follow up these leads, or would you turn the name over to some other salesman, or how did you do that?
>
> "A. Well, if I was busy in the office and one of the salesmen knew them I would have him contact them. If not, either I or my father would go to see them."

At another point:

> "Q. Who directed the salesmen what to do? Who supervised them?

"A. Well, we usually talk it over together and try to put it over until my father came in."

Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question and includes such incidental authority as is necessary, usual and proper as a means of effectuating the purpose of the employment, and this is so whether an agency is general or special. 21 R. C. L., 853.

In *Pollard* v. *Me. C. R. R. Co.*, supra, it was said:

"The nature of Howard's (employee) "employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes to be attained and all material considerations, constituted the real test of liability."

The plaintiff's counsel advances the contention that the employee had "broad, unlimited powers and authority to do whatever he thought best, to obtain leads, prospects and customers directly or by social contacts." We cannot extend to him such a scope of authority. It is true that, in the routine work of the garage, he was a general "all around man," and, in the absence of his father, had charge — was "manager," although it was not stated whether the absence of the father was a matter of days, hours or minutes. But, even so, it could not be inferred that a man left in temporary charge of the garage would have authority to provide entertainment for prospective customers. Moreover, as a salesman, he was limited in authority, as appears from his testimony above quoted.

Both the father and the son, employer and employee, respectively, were closely questioned as to the employee's "duties" and "authority" as a salesman, and they were allowed to give their conception thereof; and, although there is nothing in the record to indicate that they would conceal anything that was of advantage to the plaintiff, neither of them went further than to state that he was authorized to get leads,

make contacts and obtain customers at social functions at which he might be present. Such is far short of authority to provide the social functions and entertainment.

An employee has implied authority such as is usual, customary and necessary. 21 R. C. L., 853; *Reifsnyder* v. *Dougherty*, 301 Pa. St., 328, 152 A. 98; *Chesapeake & O. Ry. Co.* v. *Ringstaff*, 67 Fed. (2d), 482. No evidence of custom or usage was offered to justify the authority claimed for the employee, nor was the trial Court's attention called to any custom or usage so generally known that judicial notice may be taken thereof, nor do we know of any such usage or custom.

If there had been other instances when the employee had furnished entertainment to prospects, or as a means of furthering the business interests in which he was employed, it would be a step toward proof of authority so to do. *Copp* v. *Paradis*, supra. But the record discloses no such instances; neither is there evidence that he had an expense account to which he might charge the cost of such entertainment, nor does it appear that the supper at the Browns' was paid for by the employer.

The principle that an agent or employee has implied autority to do what is proper and necessary is not helpful to establish authority of the employee in the instant case. It is not sufficient that the act of the agent or employee is advantageous to, or convenient for, his principal, or even effectual in transacting the business in which he is engaged. 2 Am. Jur., Agency, Sec. 87. It may well be that, on occasion, the entertainment of customers may be advantageous, but the same may be said of many things that a salesman might do. The language of the Court in *United States Bedding Co.* v. *Andre*, 105 Ark., 111, 150 S. W. 413, 414, 41 L. R. A. N. S. 1019, is applicable:

> "In order to solicit orders for or to make sales of goods, it is not indispensable that the travelling salesman shall advertise them in a newspaper or upon bill boards. Such

advertisements may be advantageous to the principal or to those buying from him; but a great many other expensive things might be done which would prove advantageous to the principal and such buyers, and yet none of them can be considered indispensable for the purpose of making a sale, and it is not ordinarily understood to be incidental to the authority given to a travelling salesman."

See also: *Tarpy* v. *Bernheimer*, 16 N. Y. S., 870; N. *Friedman & Sons* v. *Kelly*, 126 Mo. App., 279, 102 S. W. 1066.

So far as the record contains evidence, Chester Frost was a salesman accustomed, with the approval of his employer, to obtain leads, contact prospects and obtain customers at any and all times and at any and all places where he might be present. His implied authority cannot be extended to the acts in question.

If we direct our inquiry as to whether, in the particular instance, it was reasonably necessary for his work to provide a supper and to request his friend to arrange a dinner and accompany him there, and for him to transport her to and from the party, the answer must be emphatically in the negative. He was a friend of the Browns, and he had learned that Mrs. Brown knew the name of a prospective buyer of a car. It is inconceivable that, under the circumstances existing, he could not have obtained the name upon simple inquiry by phone or otherwise. It is equally inconceivable that he needed a party to provide an approach to his friend Brown as a prospective customer.

His own testimony as to what attention he gave to business at the party is not convincing that the party was necessary to his employer's interests. Questioned relative thereto he testified as follows:

"Q. And did you attempt to, that evening, talk with Mr. Brown and persuade him to exchange automobiles?

"A. Well, I mentioned the fact to him and asked him if he was in the market to trade.

"Q. You did not finally induce him to trade, did you?

"A. No."

It also is significant in this respect that, as to obtaining from Mrs. Brown the name of the prospective customer, he testified on direct testimony that he obtained the name; and on cross examination testified that he did not obtain the name.

Although it was within the scope of his employment to obtain the name of a prospect and to contact a possible customer, he was not authorized to employ a means of doing so that was unnecessary and involved additional risks, when the purpose could be achieved by the usual methods. That it did involve additional risks is evident from the present case. The supper was clearly superfluous so far as the interests of the employer were concerned.

Plaintiff's counsel have cited cases, mainly from other jurisdictions, dealing with situations in some respects similar to that of the instant case. To adopt a precedent as controlling we must be convinced that it is founded upon correct principles, but we think that all of the cases cited are distinguishable from the instant case. *Good* v. *Berrie*, 123 Me., 266, 122 A. 630, is not in point sufficiently to be controlling. The instant case involves issues vital to its determination that do not appear in the cited case. That case involved the question of deviation by the driver from his master's business. It was held that the evidence justified the finding that the driver, at the time of the collision and injuries to a person whom he met upon the road, had returned to his master's business. There was involved no question of entertaining of prospective customers nor of the responsibility of the employer to a person riding in the car at the invitation of the employee.

As to the cases cited, to the effect that an employee may be in the course of his employment while also acting for his own in-

terests, we accept that principle without question, and it applies whether the employee's interest is in the nature of business or pleasure. The principle is too well established to require citation of authority.

The case of *Raduenz* v. *Kelly*, 295 Ill. App. 622, 14 N. E. (2d), 509, is of no assistance to the plaintiff. There, the employee, engaged in selling cars of the employer, was on his way to the garage in the employer's car to change for another car to use in demonstration, and collided with plaintiff's automobile.

In the case of *Wilhoit* v. *Iverson Tool Co.*, supra, the driver of the defendant's car was employed as a salesman of supplies to oil producing companies. One of his duties was to cultivate the acquaintance and friendship of men engaged in the oil producing business and he was provided with an expense account for this purpose. He entertained business prospects and his accounts of expenses therefore were regularly rendered to his employer and allowed. He collided with the plaintiff's car while driving the car provided for him by his company. The case did not involve the question of injuries to one riding with the employee.

The case of *Bentley* v. *Oldetyme Distillers*, 71 N. D. 52, 298 N. W., 417, involved injuries to the plaintiff while riding with the employee of the defendant company. The employee, Gannon by name, was stated by the Court, in its summation of the facts, to be the sole contact man for the defendant in promoting its business in the State of North Dakota. He was not a salesman. The defendant was a wholesale distributor of certain brands of whiskey, and Gannon had broad powers to do anything and everything his judgment determined was necessary to promote good will toward the products of the defendant. He could invite a bar-tender to dinner and take him out. It was a part of his business to attend openings of saloons for the purpose of ingratiating himself with the saloon keepers and the bar-tenders. As to when Gannon should

attend such openings, how he should go, how he should handle the situation, were all left to his judgment and discretion. The plaintiff was a bar-maid and Gannon took her in his automobile to attend the opening of a saloon and to act as hostess thereat. We do not consider that the case is sufficiently similar to the instant case to be authority for the plaintiff's contentions.

In *Lindemann* v. *San Joaquin Cotton Oil Co.*, 5 Cal. (2d), 480, 55 P. (2d), 870, according to the statement of facts by the Court in its opinion, the driver of the defendant's car, Ewing by name, was the district manager of the company. The defendant corporation was a cotton-gin operator and the plaintiff a large grower of cotton. Ewing's duties were to solicit business from the farmers, settle accounts, arrange budgets and other details in connection with the loans, and advise and counsel as to the production and sale of cotton. He also did a certain amount of contact and public relationship work as between his company and the farmers, creating and maintaining a friendly relationship between the company and the community. It was a part of his duty to see that the growers who were financed by his company, among whom was the plaintiff, attended a meeting of an agricultural association which was held for purposes in which both the plaintiff and defendant were interested. After the meeting Ewing offered to take the plaintiff to his home and the plaintiff accepted, saying that he wished to talk over business matters with him. Such matters were under discussion during the journey, which was interrupted by the accident which caused the injuries to the plaintiff.

In each of the cases cited there was evidence which would justify a finding by a jury of authority in the employee. In the instant case we find that the evidence as to the authority of the employee was not such that a jury would be justified in finding that he was acting in the course of his employment in transporting the plaintiff to her home.

The presiding Justice was correct in the granting of the motion for a directed verdict.

Exceptions overruled.

JERRY L. HAILE ET AL., APPELLANTS

vs.

SAGADAHOC COUNTY COMMISSIONERS.

Sagadahoc. Opinion, May 7, 1943.

Highways.

The procedure relative to the laying out of highways by county commissioners and the relocating of highways is purely statutory, and the provisions of the statutes must be strictly adhered to.

Section 11 of Chapter 27, R. S. 1930, requires that a petition to county commissioners to relocate boundaries of highways of which the location is lost must be presented by municipal officers.

The procedure relative to the laying out of highways by county commissioners and the procedure for the relocation of lost boundaries apply to different situations and call for different action upon the part of the county commissioners.

ON EXCEPTIONS.

The appellants petitioned the County Commissioners of Sagadahoc County to examine a certain road in Sagadahoc County and to redefine and relocate, if necessary, the boundaries thereof as prescribed in Section 4, Chapter 27, R. S. 1930. The road in question was made a part of Sagadahoc County but was not made a part of any town therein. The

procedure for redefining and relocating a road the boundaries of which are lost is provided for in Section 11 of said Chapter 27, and by the provisions of Section 11 must be made by municipal officers.

The County Commissioners dismissed the petition. The petitioners appealed to the Superior Court. The respondents filed a motion to dismiss. By agreement the matter was heard in vacation, and the justice who presided at the hearing denied the motion to dismiss. The respondents excepted. Exceptions sustained. The case fully appears in the opinion.

Edward W. Bridgham,

Harold J. Rubin, for appellants.

John P. Carey,

Ralph O. Dale, for appellees.

SITTING: STURGIS, C. J. THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The case comes to this Court on exceptions by the respondents to the refusal of the presiding Justice of the Superior Court to grant a motion to dismiss the petition which was before that Court on appellate proceedings from the decision of the County Commissioners of Sagadahoc County.

The petitioners, six in number, designate themselves in the petition as "responsible persons residing in the Town of Brunswick," and set forth that the "true boundaries of a duly located road in the County of Sagadahoc are doubtful, uncertain or lost," and pray that, after notice and hearing, the County Commissioners "examine said road and redefine and relocate, if necessary, the boundaries as prescribed by Section 4, Chapter 27, of the Revised Statues of 1930."

The County Commissioners dismissed the petition and the petitioners filed with the County Commissioners, notice of an

appeal to the Superior Court. In the Superior Court, in vacation, after the June 1942 term, which was the next ensuing term after the decision of the County Commissioners, the respondents filed a motion to dismiss. By agreement the matter was heard in vacation by the Justice who had presided at the said June term. The motion to dismiss was denied by the presiding Justice and to said denial the respondents excepted.

In the petition it is alleged that in 1835 the Legislature incorporated the "Proprietors of Merrymeeting Bridge," with authority to erect and maintain a bridge over the Androscoggin River from land in Brunswick to land in Topsham on the opposite bank of the river, and to purchase and hold such real estate and personal property as was necessary to effect the objective referred to. It is further alleged that, by act of the Legislature in 1878, authority was given to the corporation to transfer the bridge and approaches, which included the road described in the petition and all rights relative thereto, to the County of Sagadahoc, if and when the County should, by vote of the electorate, accept the provisions of the Act. The approval of the voters of the county was duly registered and transfer made.

By the Act, the land occupied by the road located in Brunswick, a part of the County of Cumberland, was set off from that county and annexed to the County of Sagadahoc, but was not made a part of any town therein.

Chapter 27 of the Revised Statutes is devoted to the general subject of highways. Section 1 of said Chapter provides that:

> "County Commissioners may lay out, alter, or discontinue highways leading from town to town, and grade hills in any such highway. Nothing in any city charter shall be so construed as to deprive them of the power to lay out, alter, or discontinue county roads within the limits thereof. Responsible persons may present, at their

regular session, a written petition describing a way and stating whether its location, alteration, grading, or discontinuance is desired, or an alternative action, in whole or in part. The Commissioners may act upon it, conforming substantially to the description, without adhering strictly to its bounds."

Section 4 provides:

"They" (the County Commissioners) "shall meet at the time and place appointed, and view the way, and there, or any place in the vicinity, hear the parties interested. If they judge the way to be of common convenience and necessity, or that any existing way shall be altered, graded, or discontinued, they shall proceed to perform the duties required; make a correct return of their doings, signed by them, accompanied by an accurate plan of the way, and state in their return when it is to be done, the names of the persons to whom damages are allowed, the amount allowed to each, and when to be paid. When the way has been finally established and open to travel, they shall cause durable monuments to be erected at the angles thereof."

Section 11 provides:

"When the true boundaries of highways or town ways duly located, or of which the location is lost, or which can only be established by user, are doubtful, uncertain, or lost, the County Commissioners of the County wherein such highway or town way is located, upon petition of the municipal officers of the town wherein the same lies, shall, after such notice thereon as is required for the location of new ways, proceed to hear the parties, examine said highway or town way, locate, and define its limits and boundaries by placing stakes on side lines at all apparent intersecting property lines, and at intervals of not more

than one hundred feet, and cause durable monuments to be erected at the angles thereof at the expense of the town wherein said highway or town way lies, make a correct return of their doings, signed by them, accompanied by an accurate plan of the way; . . . Said municipal officers shall maintain all highway or town way monuments, and replace them forthwith when destroyed. . . . . "

It is to be noted that Sections 1 and 4 relate to the same subject matter, viz., the laying out, altering, discontinuing and grading of highways, while Section 11 relates to highways the true boundaries of which have become doubtful, uncertain or lost, and the relocating and redefining of the same. It is further to be noted that the petition drawn under Section 1 is to be presented by "responsible persons," while the petition under Section 11 is to be presented by the "municipal officers of the town" wherein the way lies.

Section 61 of the said Chapter provides an appeal for parties aggrieved by the decision of the County Commissioners proceeding under Section 1. The appeal is to the Superior Court and may be made at any time after the filing of the decision of the County Commissioners before the next ensuing term of the Superior Court in the County, at which term the appeal shall be entered and prosecuted. There is no statutory appeal to parties aggrieved by the decision of the County Commissioners proceeding under Section 11, except as to damages. See *Conant, Appellant,* 83 Me., 42, 21 A., 172.

The petitioners, designating themselves as "responsible persons," in accordance with Section 1, allege, in accordance with Section 11, that the boundaries are "doubtful, uncertain or lost" and ask that the same be "redefined and relocated," but add to their prayer, "as prescribed by Section 4." Their petition fulfills in part the requirements of Sections 1 and 4 and, in part, the requirements of Section 11, but does not completely fulfill the requirements of either procedure.

The procedure authorized under Sections 1 and 4 and that under Section 11 are distinct. They apply to different situations and call for different action upon the part of the County Commissioners. The procedure being purely statutory, the provisions of the Statute must be strictly adhered to. *Webster* v. *County Commissioners*, 64 Me., 436.

The Massachusetts Court has repeatedly held that sections in its own Statute similar, respectively, to Sections 1 and 11, are distinct as to subject matter and procedure. *Tufts* v. *Mayor and Aldermen of Somerville*, 122 Mass., 273; *Bennett* v. *Wellesley*, 189 Mass., 308, 75 N. E., 717; *Main* v. *County Commissioners of Plymouth*, 212 Mass., 182, 185, 98 N. E., 621, 623. In this case the Court said:

> "It is settled that the action to be taken under these two respective sections is fundamentally different. This is recognized in both the opinions in Bennett v. Wellesley, 189 Mass., 308, though perhaps most clearly stated in the dissenting opinion of Knowlton, C. J., in language which as to this point was not the subject of disagreement: 'If a petition plainly calls for an alteration, within the meaning of Section 1, the Commissioners have no jurisdiction to act upon it under Section 12; and if it plainly calls for a relocation, within the meaning of Section 12, they have no jurisdiction to proceed under Section 1.' "

It follows that, if a petition calls for relocation, as provided in Section 11 of our Statute, it must be presented by municipal officers, as provided in that section. So failing, it is faulty. See also *Barnes & another* v. *The Mayor &c. of Springfield*, 4 Allen, 488.

If it be said that the petition could not be presented by municipal officers because the land occupied by the road was not a part of any town and that, consequently, there were no municipal officers, the answer is that the Legislature has not provided for such a contingency.

Furthermore, if the petition could be construed as correctly drawn under Section 11, there being no statutory appeal under that section, it could not be brought to the Superior Court for review by that method. An appeal from the decision of County Commissioners lies only if authorized by statute. *Webster* v. *County Commissioners*, supra.

The petition cannot be considered as drawn under the provisions of Sections 1 and 4 because it does not allege subject matter covered by those sections, nor does it seek the remedy there provided.

The respondents urge, as another reason for the dismissal of the petition, that the appeal was not entered at the June term of the Superior Court, the next term held after filing of the decision by the County Commissioners. If the appeal were not then entered the matter would be subject to dismissal by the Court, irrespective of any of the foregoing reasons. Counsel for the petitioners in their brief claim that entry was made of the appeal at the June term. We have no source of information upon which we can make decision on this point except the bill of exceptions, and this does not adequately inform us. The copy of so much of the record as is annexed to and made a part of the bill of exceptions, discloses no such entry, but certain statements contained in the bill of exceptions might indicate that there was such an entry properly before the Court and, consequently, filed at the proper time. If we were obliged to make decision upon this point it would be necessary to return the bill of exceptions for correction under the provisions of Chapter 86 of the Public Laws of 1941; but, in view of the foregoing rulings, it would serve no purpose.

The petitioners were not entitled to maintain an appeal from the decision of the County Commissioners and, therefore, the Superior Court had no jurisdiction.

Exceptions sustained.

LOUIS E. LIBBY *vs.* AMOS HEIKKINEN.

AROLYN LIBBY *vs.* AMOS HEIKKINEN.

Androscoggin. Opinion, June 17, 1943.

Automobiles. Jury Verdict.

Questions of fact are for jury determination. The finding of jurors which has support in competent testimony should not be disturbed.

ON MOTION FOR NEW TRIAL.

The two actions relate to a collision between the automobile of Louis E. Libby while driven by Arolyn Libby, his wife, and one driven by the defendant. Testimony in the case was conflicting. The jury found for the plaintiff in each case. The defendant moved for a new trial. Motion overruled. The case fully appears in the opinion.

Frank W. Linnell,

John G. Marshall, for the plaintiffs.

Harry M. Shaw,

Robert B. Dow, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. In these cases, tried and argued together, the defendant, on general motions for new trial, seeks to set aside jury verdicts of $500 for Louis E. Libby and $643.75 for Arolyn Libby, his wife.

The actions relate to a collision between the automobile of Louis E. Libby, operated by his wife, and one driven by the defendant at a five-road intersection in the town of Mechanic

Falls. The verdict for Louis E. Libby covers property damage, medical and hospital expense incident to the care of his wife, and loss of consortium. The verdict for Arolyn Libby relates to personal injuries.

The accident occurred in broad daylight on a clear January day. Both cars were traveling on straight roads having tarvia surfaces twenty feet in width, with shoulders of three feet or more outside the tarred surface on each side. The Libby car was proceeding westerly on a highway running generally east and west and that of the defendant northerly on one running generally north and south. A growth of soft-wood timber in the angle between the two highways at the point of intersection restricted to some extent the views of both drivers of the particular section of road each was approaching at the point where the other car was traveling.

On the facts developed several sections of the law of the road might be considered important. These relate to both speed and rights of way but it is not contended that the jurors were not properly instructed as to the applicable law. There was conflicting testimony as to the speeds of the respective cars approaching the intersection, as to the exact manner and position in which they came into contact with each other, as to their positions when they came to rest after the collision, and as to whether or not the Libby car came to a stop either before entering the intersection or before, and how long before, the instant of the impact. These questions were very distinctly issues of fact to be resolved by the jury and the evidence given by the plaintiff Arolyn Libby, if believed by the jurors, as we must assume it was believed, was more than sufficient to justify findings that the defendant was negligent and that she, as the operator of the Libby car, was in the exercise of due care. It is unnecessary to cite authorities for the principle of law that under such circumstances the mandate is each case must be

Motion overruled.

LEON J. FORTIN *vs.* JOSEPH F. FORTIN.

Sagadahoc. Opinion, July 9, 1943.

Executors and Administrators. Pleading and Practice.

After a case has been remanded for correction of the bill of exceptions and re-entered, a motion to dismiss the bill of exceptions for insufficiency, filed at the time of review must be dismissed.

In the instant case the administrator d. b. n. c. t. a. had the power to compromise and release the obligation of the defendant upon the note he owed the estate, and the compromise made in good faith was binding upon the parties.

Inasmuch as the defendant was indebted to his mother's estate and discharged his obligation in part by giving the note involved in this suit to the plaintiff, that discharge was a sufficient consideration for his new undertaking.

ON EXCEPTIONS.

Action on a promissory note given by defendant to plaintiff. The defendant was in debt to the estate of which the plaintiff was administrator. The plaintiff made a compromise with the defendant by which the defendant was discharged from liability, on his note to the estate. A part of the compromise agreement was the giving to the plaintiff by the defendant the note which was the subject of this action. The defendant claimed want of consideration. The action was tried without a jury. Decision was for the plaintiff. Defendant excepted. Exception overruled. The case fully appears in the opinion.

Ralph O. Dale, for the plaintiff.

Ellis L. Aldrich,

Sherwood Aldrich, for the defendant.

SITTING: STURGIS, C. J. THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. This action on a promissory note was tried in the court below without a jury and with right to exceptions as to matters of law reserved. On issue joined on a plea of want of consideration, the decision was for the plaintiff for the full amount of the note, and the defendant reserved an exception. The case having been remanded for correction of the bill of exceptions and re-entered, it is in order for review and the motion to dismiss now filed, having no procedural warrant, must be dismissed.

Out of the maze of its inconsistencies, the record discloses that Floredo Fortin, the administrator d. b. n. c. t. a. under the will of his mother, Phidamene B. Fortin, formerly of Brunswick, deceased, having in his possession as an asset of the estate an overdue note for $2,500 and accrued interest, which his brother Joseph Fortin had given their mother in her lifetime, demanded payment, threatened suit and settled the note by waiving the interest due on it and having Joseph, the maker, give him as an individual a note for $1,000 and give another note for $1,200 payable in five years without interest to their brother Leon Fortin, the plaintiff in this action. This was done in good faith and in the belief of all the parties, undoubtedly based on advice of counsel, that Floredo and Leon Fortin, under the third paragraph of their mother's will, were entitled to the principal of the note which Joseph owed her, and as to him, all unpaid interest was to be waived.

The evidence warrants the finding that what actually happened in this case was that by way of compromise the administrator of Phidamene B. Fortin's estate discharged Joseph Fortin from his liability on the note he owed his mother and at the same time, with the new notes he gave them, paid the legacies to which Floredo and Leon Fortin claimed they were entitled, and until this suit on Leon Fortin's note was begun, all concerned treated the settlement as having that effect. It is only now when action upon the note which he owed his mother is undoubtedly barred by the statute of limitations that

Joseph Fortin comes forward with the claim that his pro tanto satisfaction of it through the notes he gave his brothers was a nullity.

The distribution of the estate of Phidamene B. Fortin which her sons carried out, although informal, was not unlawful. *Gardiner* v. *Callender,* 12 Pickering 374. Her administrator undoubtedly had the power to compromise and release the obligation of Joseph Fortin upon the note he owed the testatrix as he did, and the compromise, made in good faith, is binding upon the parties. *Chase v. Bradley,* 26 Me., 531; *Wallin* v. *Smolensky,* 303 Mass., 39, 41, 20 N. E., (2d), 406; *O'Rourke* v. *Sullivan,* 309 Mass., 424, 428, 35 N. E., (2d) 259; *Parker* v. *Prov. & Stonington S. Co.,* 17 R. I., 376, 22 A., 284; 23 A., 102, 14 L. R. A., 414, 23 Am. St. Rep., 869. And although the administrator could not have been compelled to pay the legacies at the time, if he cared to assume the risk, he could lawfully do so. *Palmer* v. *Estate of Palmer,* 106 Me., 25, 75 A., 130; 19 Ann. Cas., 1184; 3 *Woerner American Law of Administration (Third Ed.),* 1793.

Nor can the distribution of the estate by compromise be set aside in this proceeding because, as is contended in defense, Floredo and Leon Fortin were not entitled under the third paragraph of the will to the legacies represented by the notes which the defendant, Joseph Fortin, gave them at the direction of the administrator. If this contention be true and the administrator has voluntarily made distribution to the wrong persons, he may have to pay the legacies again to those who are entitled to them or otherwise stand charged in his accounts for the payments. *Daniel* v. *Baldwin, et al.,* 148 Ala., 292, 40 So., 421; *Defriez* v. *Coffin,* 155 Mass., 203, 29 N. E., 516; *Boales* v. *Ferguson,* 55 Neb., 565, 76 N. W., 18; *McFarlin's Estate,* 267 Pa., 510, 111 A., 444; 3 *Woerner American Law of Administration (Third Ed.)* 1794; 34 *C. J. S.* 409. But that question is between the administrator, other legatees and the creditors, a category in which Joseph Fortin is not included

and is *res inter alios* in this action. *Manson* v. *Peaks*, 103 Me., 430, 432, 69 A., 690, 125 Am. St. Rep., 311.

No more tenable is the claim of the defendant that he is not liable on the note he gave the plaintiff, Leon Fortin, because no consideration passed to him from the payee. He was indebted to his mother's estate and he discharged that obligation in part by giving his note to the plaintiff. That discharge was a sufficient consideration for his new undertaking.

There being plenary evidence in this case upon which the decision below can rest, the exception finally perfected is without merit and cannot be sustained.

Exception overruled.

ERNEST A. ATHERTON

vs.

FAYETTE CRANDLEMIRE ET AL.

Penobscot. Opinion, July 12, 1943.

Automobiles. Negligence.

Each of two tort feasors whose separate negligent acts operate together to cause damage to another is liable for the full damage, although the injured party may have but one satisfaction.

A driver's position traveling along a highway on the left of the middle of the traveled portion, unexplained, will preclude him from recovery for damages suffered in collision.

Factual findings by a jury that plaintiff's position on the highway did not constitute negligence and that separate negligent acts of the defendants operated proximately to cause of the damage to the plaintiff are conclusive when they have support in testimony.

In measuring damages much must be left to the judgment of the jury.

Language written upon a verdict in an attempt to apportion damages between two defendants is surplusage and does not impair the validity of the general verdict.

ON MOTION FOR NEW TRIAL.

Action for personal injuries and property damages resulting from a collision between plaintiff's automobile and that of the defendant, Crandlemire. Plaintiff's car was forced into the center of the highway by the action of defendant Gagnon in driving his truck out of a private driveway and was in that position when the collision occurred. The jury awarded damages of $800.00 to the plaintiff. The defendant, Crandlemire, filed motion for new trial. Motion denied. The case fully appears in the opinion.

Edward Stern,

Atherton & Atherton, for the plaintiff.

Fellows & Fellows, for the defendants.

SITTING: STURGIS, C. J. THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. In the Trial Court the plaintiff herein recovered a verdict against two defendants as joint *tort feasors,* wherein damages were assessed at the sum of $800. It is entirely clear under the law in this State that each wrongdoer is liable for the whole amount of damage resulting from separate negligent acts which operate together to cause damage to another, although the party injured can have but one satisfaction, *Stuart* v. *Chapman,* 104 Me., 17, 70 A., 1069.

The case comes to this Court on a general motion filed by the defendant Crandlemire alone, and although no exception was noted in connection with the action, reliance in argument is based not only upon the usual allegations of such a

motion, but on the fact that the verdict returned by the jury carried the statement "$400.00 each" immediately following the assessment of the damage.

Plaintiff's damage resulted directly from a collision between a motor vehicle owned and operated by him and one owned and operated by the defendant Crandlemire approaching each other to meet and pass upon a highway, but the act of the defendant Gagnon in driving a motor vehicle from a private driveway into the path of the plaintiff, which forced the latter to sheer his car to the left and partly across the center line of the road he was traveling where the collision with the defendant Crandlemire occurred, must have been found by the jury to be a part of the proximate cause of the accident.

The verdict cannot be set aside on the general motion, either on the issue of liability or on the basis that the damages assessed are excessive. It is established law that when the operator of a motor vehicle comes into collision with another on the left of the middle of the traveled portion of the highway, contrary to the express provisions of R. S. (1930), Chap. 29, Sec. 2, his position constitutes evidence of negligence which, unexplained, will preclude him from recovery for any damage suffered, *Bragdon* v. *Kellogg*, 118 Me., 42, 105 A., 433, 6 A. L. R., 669. The evidence presented to the jury, so far as eye-witnesses to the accident are concerned, came exclusively from the parties and from the wife of the defendant Crandlemire, who was riding with him at the time of the accident. That evidence presents very sharply conflicting issues of fact as to the speed of the Crandlemire car, the space available for him to have turned that car farther to his right hand side of the road, and the exact place of the collision with reference to the vehicle of the defendant Gagnon, which did not come into contact with either of the other cars. It should perhaps be noted that the defendant Gagnon in his testimony made repeated reference to a curve or curves in the highway and stated that the

plaintiff Atherton was trying to overtake and pass him on a curve when the impact occurred, but all other eye-witnesses to the accident, and the State Highway Police officer who investigated it, are in agreement that the road was straight and that all the drivers had a clear view for several hundred feet each way from the place where the collision occurred. No exceptions having been taken to the charge given to the jury, or to any refusal of specific requests in that regard, it must be assumed that proper instruction was given on the applicable law, *Frye* v. *Kenney*, 136 Me., 112, 3 A(2d), 433, and that the jurors as triers of the fact accepted the testimony given by the plaintiff on these issues as true and rejected that offered by and on behalf of the defendants; that they determined as facts that both defendants were negligent and that plaintiff, notwithstanding his position in the center of the road, was not. The law is too thoroughly established to require the citation of authority that under such circumstances a jury verdict on the issue of liability should not be disturbed.

The money figure fixed by the jury must be considered as awarding $525 for pain and suffering and $275 for property damage, since the plaintiff's testimony that his totally wrecked car was worth $300 prior to the accident and represented only $25 of junk value immediately thereafter was not disputed in the evidence. In the measurement of such damage "much must be left to the good judgment of a jury," *Bouchard* v. *Canadian National Railways et al.*, 138 Me., 228, 23 A (2d), 820, and while the amount may seem large in view of the fact that the plaintiff felt no need of medical care except for a single call on a physician shortly after the accident, there is nothing in the record to justify belief that the jurors were influenced by bias, prejudice or other improper motive and no justification for this Court to substitute its judgment for that of the tribunal which heard the plaintiff testify and had the opportunity to observe his condition fourteen months after the injuries were suffered.

This leaves for consideration the question whether the verdict should be disturbed because of the language already quoted which shows that the jurors attempted to apportion the damages between the two defendants. On this issue our action must be controlled by the decision in *Currier* v. *Swan et al.*, 63 Me., 323. In that case, which was trespass *quare clausum* against four defendants, the jury returned a general verdict against all and with it a separate paper, signed by the foreman, assessing damages at $5 against one of the defendants and at $25 against each of the other three. This separate paper, like the verdict, was received and affirmed. The case was carried to this Court on general motion and on an exception relating to the attempted apportionment by the jury of the damages assessed. The Court, speaking through Mr. Justice Peters (later Chief Justice), declared:

> "The jury undoubtedly undertook to apportion among the defendants what part of the verdict each of them, as between themselves, should pay. This amounted only to a recommendation. If it was intended as anything else, it is merely surplusage, and is to be rejected as irregular and void. The general verdict must stand."

Counsel for defendant cites us to *Walder* v. *Manahan et al.*, 29 A (2d), 395, 21 N. J. Misc., 1, which held a verdict for "$20,000; $10,000 against each defendant" illegal in form. This New Jersey case, reported from the Circuit Court, was decided on the authority of *Ross* v. *Pennsylvania Railroad Co. et al.*, 138 A., 383, 5 N. J. Misc., 811, which involved a verdict of $16,000 against each of two defendants, with nothing to indicate whether it purported to find damage of $16,000 or of that $32,000 which would be the total of the two named amounts. In the *Walder* case, Judge Kinkead declared that the *Ross* case must control "until the Court of Errors and Appeals rules to the contrary."

There seems to be no necessity in the present case for this

Court to pass upon the question as to whether an irregularity in the rendering of a verdict might be considered on general motion, there being no exception before us, since within the rule declared in *Currier* v. *Swan et al.*, supra, the extraneous matter must be considered as surplusage and disregarded.

Motion overruled.

JOHN A. MCKENZIE *vs.* FRED L. EDWARDS.

Oxford. Opinion, July 23, 1943.

Reference and Referees.

The credibility of the several parts of the evidence and the reconcilement of the conflicts were for the referees to determine.

Evidence as to conflicting methods for determining the cord measurement of wood was admissible to prove and explain the specified item in the account to which it related.

When an award is made by referees in an amount less than would have been permissible on the rejection of a part or parts of testimony offered in defense, it is not the function of the Law Court to conduct an audit in order to determine with exactitude the sum which would represent the exact measure of damages.

ON EXCEPTIONS.

Action of assumpsit to recover on an account. There was considerable conflict in the testimony of plaintiff and defendant and several errors of computation. The referees awarded the sum of $900.03 to the plaintiff. The defendant excepted. Exceptions overruled. The case fully appears in the opinion.

E. Walker Abbott, for the plaintiff.

Peter M. MacDonald,

Alphonso A. Aliberto, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MURCHIE, J. This case is brought to the Law Court by a bill of exceptions filed by the defendant after a referees' report awarding $900.03 to the plaintiff in an action of assumpsit, wherein the account originally annexed to the writ showed a balance of $3,135.76 claimed, was accepted over objections in writing duly filed. The writ was amended before the Rule of Reference was issued, and specifications were filed by the plaintiff, stating credits to be allowed against the charges set forth in the amended account, which show a claimed balance of $8,549.26. The aggregate of charges was $1.00 greater in the specifications than in the amended account.

Two issues stated in the filed objections are raised by the bill of exceptions, first, that the referees erred in law in admitting testimony concerning a quantity of wood which the plaintiff claims he sold and delivered to the defendant but which was not listed in his specifications, and second, that the referees made an arithmetical error in the addition of credits which were admitted in evidence.

The first exception involves testimony of the plaintiff relative to 600 cords of wood claimed to have been sold and delivered to the defendant but not included in his specifications, although it had been agreed at the trial that he would rely wholly on the items specified therein.

Counsel for the plaintiff urges that this exception is not properly before the Court because no ground for the objection to the admission of the evidence was stated when it was offered, or is stated in the bill of exceptions, and that admission of the testimony could not be held prejudicial to the defendant

because evidence of the same tenor was given without objection both before and after that admitted over objection. It seems unnecessary to consider technical questions on the point because while plaintiff did refer in his testimony to 600 cords of wood, a quantity not separately named in his specifications, he did so in explaining that his specified charge for 1,553.5 cords of wood covered a quantity which was scaled, when he purchased it, at approximately 1,420 cords. His evidence was that he bought the wood on a merchantable content scale and sold it to the defendant on a running foot scale; that an overrun necessarily resulted in favor of the running foot scale; and that the amount of the overrun was represented by the difference between the 1,420 cords (approximately) of his purchase scale and the 1,553.5 charged. This is less than 10%. It is true that he referred to this spread in his testimony as 600 cords and that, in cross-examination, he estimated the percentage of overrun at 40%. This inconsistency might well be considered as affecting the credibility of his testimony (a question for the referees), but it is manifest that the evidence admitted over objection did not relate to a particular 600 cords of wood, or any other quantity, not listed in his specifications. It related to the item of 1,553.5 cords definitely listed therein. There is no merit in the exception.

The second exception relates to alleged arithmetical error on the part of the referees—a mathematical mistake which would lay foundation for correction of error notwithstanding the rule of finality for the factual findings of referees (supported by evidence of probative force), which is too well recognized to require the citation of authorities but we cite *Staples* v. *Littlefield*, 132 Me., 91, 167 A., 171, on the point as we shall refer hereafter to language used in the opinion. Defendant does not contest the principle but urges the availability of a qualification thereon, stated in *Hagar* v. *New England Mutual Marine Insurance Co.*, 63 Me., 502 at 504, as follows:

> "an award may be set aside for a mistake in fact apparent upon the face of the award, as where there has been a manifest error in computation, showing that the result stated is not that intended and does not therefore express the real judgment of the referees."

When we refer to the record, the amended account, the specifications and the objections filed to the acceptance of the referees' report, we find that counsel for the defendant has made some errors of his own in computations. The filed objections declare that the plaintiff claims a total price, covering all his charges against the defendant, of $22,658.80. The items set forth in the amended account aggregate $22,714.80. The specifications give the figure $1.00 larger as already noted, but the difference is explained by noting that the price of 129 acres of land figured at $4.00 per acre is erroneously stated as $518.00. In the written objections it is stated that the defendant offered evidence of checks and credits admitted totalling $22,756.43. Tally of the items presented in evidence, some of which were denied rather than admitted, shows a total of $22,765.45. In building up the total a charge for (river) driving, set forth in detail in one of the defendant's exhibits at $327.33, is stated at $365.26 in the verbal testimony. The defendant explained this difference by saying that he added an item of $37.46 in cash handed to the plaintiff, but this leaves an error of $.47, not on the part of the referees but on that of the defendant, or his counsel.

The total of $22,765.45 includes, in addition to the $37.46 in cash and the $.47 error, claimed credits of $500 and $100 respectively which the plaintiff insisted, as the evidence was given, represented duplications of items appearing in a list of checks admitted by the plaintiff to have been received. The specifications of the plaintiff acknowledged receipt of 39 checks representing a total of $12,136.60. The list just referred to enumerates 50 amounts aggregating $12,209.50. Exhibits in-

troduced by the defendant show 53 checks and the detailed statement of driving charges, which build up to a total of $13,673.61. We make no effort to reconcile these apparently conflicting figures. This was the function of the referees. On the record it would have been proper for them to find that one item represented a duplication (perhaps more than one), but the amount of the award seems to indicate that they did not. The credits claimed by the defendant include items of $150.00 and $50.00 respectively for payments claimed to have been made on December 13, 1929, and November 9, 1931 (the year guessed at but the month and day definitely stated), which are additional to the checks listed in the testimony and to the cancelled ones shown in the exhibits, and were disputed by the plaintiff. Testimony relative to the first was attempted to be supported by reference to a stub in the defendant's check-book, but the second depended on recollection alone. It was for the referees to accept, or to reject, this testimony, as well as that relating to one of the cancelled checks which was drawn June 22, 1929, to the order of one J. W. McKenzie, a son of the plaintiff, in the amount of $700.00. The evidence of the defendant was that he made this payment on the plaintiff's order, but no order was produced.

It is apparent that an award in the approximate amount of that made by the referees would be supported in the evidence if defendant's testimony relative to the items of $150.00, $50.00 and $700.00 was rejected. The balance due the plaintiff, if his charges were all found to be proper ones, and these particular credits rejected, would be $858.37. The referees, however, might well have rejected also the cash item of $37.46, and discovered the error of $.47. This would increase the excess of charges over credits to $896.30, with no allowance for interest to the date of the writ. A very small amount of interest would increase the figure beyond the awarded $900.03.

It is not easy to point out evidence in the record which will lead to the exact amount of the award without duplicating the

careful audit which the referees must be assumed to have made. But the rule of finality for factual findings of referees, as expressed in *Staples* v. *Littlefield,* supra, that this Court is not:

> "obliged to study the voluminous report of the evidence . . . for the purpose of ascertaining on which side the evidence preponderates or what testimony we regard as most entitled to credence"

indicates that we should not be expected to perform an auditing function to demonstrate with exactitude that the sum allowed, which is less than that which might have been allowed, is the exact and proper measure of damages in the case.

Exceptions overruled.

ENOCH C. RICHARDS COMPANY

vs.

HARRY C. LIBBY, EXECUTOR.

Cumberland. Opinion, July 30, 1943.

Review. Demurrer. Clerks of Courts.

"A review may be granted in any case where it appears that through fraud, accident, mistake, or misfortune, justice has not been done and that a further hearing would be just and equitable, if a petition therefor is presented to the Court within six years after judgment." R. S. 1930, Chapter 103, Section 1, Par. VII.

A deputy Clerk of Courts is an officer of the Court who has custody of the docket and immediate and direct information as to assignments for trial and all other docket entries. He is not required to inform absent attorneys concerning such matters; but, in the instant case, the petitioner's attorney had a right to rely upon the positive assurance of the Deputy Clerk, a representative of the Court itself, that he would receive notice in season to protect his client's rights; and such reliance did not constitute negligence.

A general demurrer admits the truth of all the facts, which are well pleaded both in legal and equitable proceedings.

ON EXCEPTION.

Review was sought of a civil action between the parties. The original case was once tried before a Justice of the Superior Court and judgment rendered in favor of the plaintiff. Exceptions by the defendant were sustained by the Law Court and the case returned for a new trial. The attorney for the petitioner, upon request for information from the Clerk of Courts as to assignment of the case for a second trial, was assured by the Deputy Clerk of Courts that he would protect the interests of the petitioner. No notice, however, was ever given to the petitioner and the case was dismissed for want of prosecution. The petition was granted. Defendant excepted. Exception overruled.

Philip A. Hanson, of Boston, for the petitioner.

Harry C. Libby, pro se.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

MANSER, J. Review was sought of a civil action between the parties. The petition was based on R. S. 1930, c. 103, § 1, Par. VII, which reads as follows:

> "A review may be granted in any case where it appears that through fraud, accident, mistake, or misfortune, justice has not been done, and that a further hearing would

be just and equitable, if a petition therefor is presented to the court within six years after judgment."

The petition was granted. The case was then presented to this Court on exceptions which appeared to be insufficient and the bill of exceptions was returned for corrections and re-entry, which has been done. The exception now before the Court makes clear that the defendant filed a general demurrer to the petition, the petitioner joined therein and upon hearing, the demurrer was overruled. It is also clear that the defendant elected to rely upon his exception to this ruling. He filed no further pleading and while the Court allowed the petitioner to proceed to a hearing, the defendant withdrew and did not participate therein.

The legal effect of the defendant's pleading was to admit the truth of all matters of fact set forth in the petition and well pleaded. Such is the long established principle of pleading and not disputed by the defendant. As said in *Herrick* v. *Osborne*, 39 Me., 231:

> "A general demurrer admits the truth of all facts which are well pleaded. Every substantive fact, therefore, which is distinctly set out in the declaration in the plaintiff's writ, must, for the purposes of this examination, be deemed to be true."

The effect of a general demurrer is the same, both in legal and equitable proceedings. *Traip* v. *Gould*, 15 Me., 82. The defendant relies upon the proposition that, admitting the facts alleged in the petition to be true, the petitioner does not show itself to be entitled to review because he contends the dismissal of the original action occurred by reason of the carelessness and negligence of the petitioner and its attorney.

Dismissing from consideration certain allegations in the petition which are argumentative or expressive of opinion, the well pleaded facts contained therein appear to be as follows:

The original action was once tried before a Justice of the Superior Court without a jury, and judgment for the petitioner rendered for $403.65. Several exceptions to the rulings of the Justice were prosecuted in this Court and one was sustained, the result of which was to return the case for a new trial. (See *Richards Co.* v. *Libby, Ex'r.*, 136 Me., 376, 10 A. (2d), 609, 126 A. L. R., 1215.)

The defendant, by filed specifications and by statements at the original trial, had admitted facts which would create a liability of $53.65, but resisted the additional claim of $350.00.

It further appears from the recitals of the petition that the attorney for the petitioner was a non-resident of the State and by letter requested information from the Clerk of Courts as to assignment of the case for the second trial. He received reply from the Deputy Clerk which included the statement, "I will protect your interest in having it assigned." Later, however, the case was dismissed for want of prosecution. The petitioner's attorney was given no notice by the Clerk or the Deputy Clerk, either before or after the dismissal of the action.

A case so dismissed goes to judgment at the same term. *Warren Co.* v. *Fritz*, 138 Me., 279, 25 A. (2d), 645. It disposes of the pending action by a final judgment against the plaintiff. The parties are out of court and the judicial power over the action has been exhausted. It cannot be restored to the docket. *Davis* v. *Cass*, 127 Me., 167, 142 A., 377.

These decisions, however, are not to be interpreted as denying a right of review if the petitioner shows himself entitled thereto under the provisions of the statute creating such right, here R. S., c. 103, § 1, Par. VII. Such review is predicated upon the fact that an adverse judgment has been rendered. In *Karrick* v. *Wetmore*, 210 Mass., 578, 97 N. E., 92, the Court held that a judgment of dismissal was a final judgment but adverted to the fact that the plaintiff might have petition for relief through one of the channels afforded by the statutes and cited R. L. of Mass., c. 193, which Chapter provided for writs

of error, motions and petitions to vacate judgments, writs and petitions for review.

According to the allegations of the petition, the petitioner, though admittedly entitled to a judgment of more than $50, and with issue still pending as to the balance of its claim, finds itself with an adverse judgment, and is subjected to the payment of an execution for costs of approximately $40. That justice has not been done and that a review would be just and equitable is clearly apparent.

The only remaining element is whether the petitioner's attorney was chargeable with negligence in relying upon the statement of the Deputy Clerk of Courts that he would protect him in connection with the assignment of the case for trial.

It is true that it is the duty of parties and their attorneys to look after their cases and to ascertain what steps are taken in their disposition. *Rosenbush* v. *Westchester Insurance Co.*, 277 Mass., 41, 116 N. E., 396. Our Court, however, has indicated that an attorney who has received assurance from the Court that he would receive notice to enable him to protect his rights, is not chargeable with negligence in his reliance upon such assurance. *Edwards* v. *Williams Estate,* 139 Me., 210, 28 A. (2d), 560.

The Deputy Clerk is an officer of the Court who has custody of the docket, and who has immediate and direct information as to assignments for trial and all other docket entries. He is not required to inform absent attorneys concerning such matters, but in the present instance he gave a deliberate written assurance that he would do so.

The case of *Pickering* v. *Cassidy,* 93 Me., 139, 44 A., 683, 684, collates many decisions illustrating the meaning of "accident, mistake, or misfortune." Its perusal but emphasiszes the statement in *Taylor* v. *Morgan & Co.*, 107 Me., 334, 78 A., 377, that each petition for review is addressed to the sound discretion of the Court and must rest upon its own proven facts. It is true that it must affirmatively appear the dismissal of the case was

made without negligence on the part of the plaintiff's attorney. *Leviston* v. *Historical Society*, 133 Me., 77, 173 A., 810; *Trust Co.* v. *Baker*, 134 Me., 231 at 237, 184 A., 767.

It has been held that apparent neglect on the part of an attorney may arise from such a mistaken belief as to what has been done by himself or others as to bring the case within the terms of the statute. *Shurtleff* v. *Thompson*, 63 Me., 118; *Sherman* v. *Ward*, 73 Me., 29 and *Grant* v. *Spear*, 105 Me., 508, 74 A., 1130. In these cases, the presiding Justice was allowed to exercise a broad discretion and it may be fairly argued that stricter rules have in recent years been laid down for guidance of the Court below. In the present case, however, the presiding Justice was justified in deciding that the plaintiff's attorney did not rely upon any mistaken belief but upon the positive assurance from an integral representative of the Court itself that he would receive notice in season to protect his rights, and that such reliance did not constitute negligence.

Exception overruled.

STATE OF MAINE

vs.

ANTHONY SMITH AND EDWARD POIRIER.

Oxford. Opinion, September 7, 1943.

Criminal Law. Rape. Jury Verdict.

The credence to be given to witnesses, the resolving of conflicts in testimony and the weight to be given to it are all matters for the jury to settle.

The single question before the Court, in the instant case was whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore declaring by their verdict that the respondents were guilty as charged.

The remark by the trial judge, in the instant case, that going into too many details should be avoided was not prejudicial to the respondents.

ON APPEAL AND EXCEPTIONS.

The testimony of the girl who claimed to have been attacked was definite and specific. Only one of the respondents testified. He denied the charges *in toto*. The jury brought in a verdict of conviction against the respondents. Respondents appealed and also presented exceptions. Appeals denied. Exceptions overruled. Judgment for the State against both respondents.

Theodore Gonya, County Attorney, for the State.

Edward J. Beauchamp,

John G. Marshall, for the respondents.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

PER CURIAM.

The respondents appeal from convictions of the crime of rape and also present exceptions to certain rulings of the presiding Justice.

The Appeals

The State contended that the crime was committed during the evening of February 22, 1942, in the town of Norway in Oxford County. Its testimony in support of the charge came almost wholly from Violet L. Poland, eighteen years old. According to her story she and her friend, Mr. Smith (not the respondent), were at Mac's Roller Skating Pavilion in Oxford. About nine o'clock in the evening she went across the road to call upon her friend, Ann Mayberry. She said: "And when I came out of her house there was a car parked beside the road, and, as I went around the car, the man went ahead and grabbed me and put me in the car.... He put his hand over my mouth and pushed me in the car." She said there was another man in the car (respondent Smith) who was in the driver's seat. She had never seen either of them before. They had a gallon of old cider in the car, a part of which had been drunk, and on their way to Norway they continued to drink and tried to get her to drink with them. Before reaching Norway she testified that respondent Poirier "forced" her "by the cement bridge," that they then continued on to a vacant space "behind Jo's restaurant, in Norway," where she testified, "They both forced me." Later in the evening, she said, they took her "up by South Paris, in the woods there somewhere, on a cross road," where Poirier forced her again. They finally left her on Pigeon Hill in Oxford and from there she walked home, a distance of two miles. Upon arrival she immediately got in touch with State Trooper Haskell, to whom she related what had taken place. She claimed injuries to her shoulder from being held "against the door in the car" and to her wrist, "where they would hold on it so tight."

It is unnecessary to state other facts in detail related by her. If believed, her relation of what took place was legally

sufficient to constitute the crime of rape as against both respondents.

The respondents contended that no crime either was consummated or attempted (the indictment contained charges both of rape and assault with intent to commit rape). Their story was (as testified to by only one of them, the other not taking the stand), that they were working "at a South Portland shipyard." Their home was in Lewiston, and on that evening they drove from Lewiston to Oxford "by Mac's Pavilion" and Norway, taking with them a gallon of cider, which they had purchased from a farmer in New Auburn. About half of it had been consumed before they reached Oxford. The defense claimed that as they were driving by the Mayberry house, Miss Poland indicated with her thumb that she would like a ride. They took her in, it was claimed, without the use of any force, she saying that she would like to ride to Norway. They contended that she voluntarily drank some of the cider.

The defense also claimed they stopped at the residence of Mary Kinsman in Norway after the time Miss Poland claimed she had been raped. Mrs. Kinsman testified that the respondents and Miss Poland did stop there between nine and ten o'clock that evening and she came out to the road in response to the blowing of their horn. She identified the respondents and related what then was said and done. She was acquainted with Miss Poland, but not with the men. She said Miss Poland was drunk, that she left the car and went back of her house to a toilet, and then returned and got into the car and drove away with them, although there was an opportunity to escape, and said nothing about having been raped. She also said that Miss Poland tried to get her to go along with her. This whole story of Mrs. Kinsman was denied *in toto* by Miss Poland.

Guilt of the respondents hinged largely upon the veracity of Miss Poland, respondent Smith, and Mrs. Kinsman. The jury must have believed that Miss Poland told the truth and rendered its verdict in reliance upon her testimony. The jury may

well have rejected Mrs. Kinsman's story due to conflicting statements in it, especially as to the day of the claimed stopping at her home. At one point in her cross-examination she said: "I don't remember just exactly to say what date it was. I didn't look on the calendar. I was going by guessing." The jury had the privilege denied us of seeing and hearing the witnesses testify on the stand. Its ability to adjudge veracity was superior to that now afforded us.

> "The credence to be given to witnesses, the resolving of conflicts in testimony and the weight to be given to it, are all matters for the jury to settle." *State of Maine* v. *Vallee,* 137 Me., 311, 316, 19 A. (2d), 429, 431.

The single question before this Court on appeal "is whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore in declaring by their verdict," that the respondents were guilty as charged. *State* v. *Priest,* 117 Me., 223, 227, 103 A., 359. Also *State* v. *Gross,* 130 Me., 161, 163, 154 A., 187; *State of Maine* v. *Brewer,* 135 Me., 208, 193 A., 834.

We should not sustain the appeals for we cannot say that the jury was not warranted in believing beyond a reasonable doubt and therefore in declaring by their verdict that the respondents were guilty of the crime of rape.

Exceptions

The first exception claimed to have been taken was to this remark made by the Court during the progress of the trial, viz., "That is what she has testified, and I think we ought to avoid, as much as possible, going into too many details and repeating too much in a case like this." Counsel for the defense then said: "I don't like to take an exception, your Honor." The Court then said: "Don't let that bother you at all. Take all the exceptions you want." From the record it would appear that no exception was actually taken, and we so hold. Further-

more, the remark was not prejudicial to the respondents. They were denied no rights. The Court in no way attempted to prevent the presentation of material facts. Apparently his thought was that, with this young girl on the stand compelled to give testimony relating to the claimed violation of her person, repetition should be avoided where possible. The respondents take nothing on this alleged exception.

The only other pressed exception was that taken to a ruling on the admission of certain testimony. Following some evidence given by respondent Smith in cross-examination as to trips that he and the other respondent had been making almost weekly to Norway, this question was asked: "Will you explain to these ladies and gentlemen what these frequent trips to Norway are for?" This was objected to for lack of materiality but admitted. As stated, this question was asked in cross-examination and we consider it a legitimate question. The answer given to the question was: "Well, we knew a lot of girls up there. We usually go up and take them out, but we never had no special girl friend up there." Thus it would seem that the trip started with an intention of contacting girls for some purpose. The presence of Miss Poland on the road was a fact that seemed to fit in to a certain extent anyway with the purpose of the trip. We fail to see any error in the admission of this testimony in cross-examination.

Counsel for the respondents argue in their brief questions of law not saved or referred to in the bill of exceptions. These questions are not such as would seem to demand discussion on the appeals, for it is not shown that manifest error in law occurred in the trial of this case and injustice inevitably resulted therefrom. *State* v. *Wright*, 128 Me., 404, 406, 148 A., 141. Also see *Springer* v. *Barnes*, 137 Me., 17, 20, 14 A. (2d), 503.

Appeals denied.
Exceptions overruled.
Judgment for the State against both respondents.

HAROLD P. BENNETT'S CASE.

Androscoggin. Opinion, September 15, 1943.

Workmen's Compensation Act.

A personal injury to be compensable under the Workmen's Compensation Act of this State must be by accident arising out of and in the course of the employment.

An injury by accident arises out of the employment when it is due to a risk of the employment and it occurs in the course of the employment when the employee is carrying on the work which he is called upon to perform or something incidental to it.

An accident cannot arise out of the employment if it does not take place in the course of it.

If an injury results to an employee from his doing something his employment neither required nor expected or in a place where his employment did not take him it cannot be said to arise out of the employment.

But contributory negligence on the part of an employee does not necessarily bar his right to compensation and even if an employee while acting in the scope of his employment performs his duties recklessly and knowingly exposes himself to danger, unless the injury can be said to have been inflicted by willful intention, the manner in which he does his work may be deemed to be a risk incidental to the employment and the injury received compensable.

The case at bar warranted the finding that the injured employee was hastening to carry on the work which he was called upon to perform when he vaulted the rail of the ramp to get to the room below, and, while in doing this he acted imprudently, he did not take himself out of the scope of his employment.

The finding by the Industrial Accident Commission that the employee's injury arose out of and in the course of his employment was based on evidence of probative value.

ON APPEAL.

Proceedings under the Workmen's Compensation Act by Harold P. Bennett against Charles Cushman Company. The

petitioner was employed in the shoe shop of the Cushman Company and a part of his work was to move racks loaded with shoes from the treeing room down a ramp to the lining and repairing room on the floor below and return the empty racks to the treeing room by loading them on a chain conveyor. The descent of the ramp was gradual and there was a guard rail on it three feet high on the side next to the conveyor.

The Commissioner who heard the case found that on May 9, 1942, which was a Saturday, and a half holiday, the factory was rushed and effort was being made to speed up production. The petitioner, a wiry and very active man in his forties, hurrying to keep up his end of the work, came down the ramp leading to the lining and repairing room and, rather than going to the end of the ramp and around the side of it to the conveyor, vaulted the rail a few feet up the ramp and in doing so fractured his right femur. At the point where he vaulted the rail, the distance from it to the floor of the lining and repairing room was three feet, seven and a quarter inches. There was no evidence that he had ever jumped the rail before, or ever saw any other employee jump it, or that there was any rule or instructions prohibiting it. The Commissioner awarded compensation, and his finding was confirmed by the decree of the Superior Court. Defendant appealed. Appeal dismissed. Decree below affirmed with costs. The case fully appears in the opinion.

Harris M. Isaacson,

Eugene F. Martin,

Arthur D. Welch, for the petitioner.

Forrest E. Richardson, for the defendant, Charles Cushman Company.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. Appeal from a decree confirming an award of compensation by the Industrial Accident Commission of this State.

The Petitioner was employed as a room-man in the shoe shop of Charles Cushman Company in Auburn, Maine, and a part of his work was to move racks loaded with shoes from the treeing room down a ramp to the lining and repairing room on the floor below and return the empty racks to the treeing room by loading them on a chain conveyor. The descent of the ramp was gradual and there was a guard rail on it three feet high and on the side next to the conveyor.

The Commissioner who heard this case found that on May 9, 1942, which was a Saturday and a half holiday, the factory was rushed in an attempt to fill orders and effort was being made to speed up production and the Petitioner, a thin, wiry and very active man in his forties, hurrying to keep up his end of the work, came down the ramp leading to the lining and repairing room intending to go to that part of that room where the empty racks were to be put upon the conveyor, and, rather than to go to the end of the ramp and around the side of it to the conveyor, vaulted the rail a few feet up the ramp and in doing so fractured his right femur. At the point where the employee vaulted the rail the distance down from it to the floor of the lining and repairing room was three feet, seven and a quarter inches. There was no evidence that the employee ever jumped the rail before, ever saw any other employee do it or that any instructions or rule prohibiting it had been issued. Upon these findings the Commissioner awarded compensation.

A personal injury to be compensable under the Workmen's Compensation Act of this State must be by accident arising out of and in the course of the employment. *Revised Statutes*, Chap. 55, Sec. 8. An injury by accident arises out of the employment when it is due to a risk of the employment and it occurs in the course of the employment when the employee is carrying on the work which he is called upon to perform or

something incidental to it. *Wheeler's Case,* 131 Me., 91, 159 A., 331; *Gooch's Case,* 128 Me., 86, 145 A., 737. An accident cannot arise out of the employment if it does not take place in the course of it. *Wheeler's Case,* supra; *Gooch's Case,* supra; *Sullivan's Case,* 128 Me., 353, 147 A., 431; *Fournier's Case,* 120 Me., 236, 113 A., 270, 23 A. L. R., 1156.

It is equally well settled that if an injury results to an employee from his doing something his employment neither required nor expected or in a place where his employment did not take him it cannot be said to arise out of the employment. *Healey's Case,* 124 Me., 145, 126 A., 735; *Saucier's Case,* 122 Me., 325, 119 A., 860. See *Hurley's Case,* 240 Mass., 357, 134 N. E., 252. But contributory negligence on the part of the employee does not necessarily bar his right to compensation and it is held that even if an employee, while acting in the scope of his employment, performs his duties recklessly and knowingly exposes himself to danger, unless the injury can be said to have been inflicted by willful intention, the manner in which he does his work may be deemed to be a risk incidental to the employment and the injury received compensable. *Fournier's Case,* supra; *Pepper* v. *Sayer* (1914), 3 K. B., 994; *Mt. Olive Coal Co.* v. *Industrial Com.,* 355 Ill., 222, 189 N. E., 296; *White* v. *Industrial Comm.,* 167 Wis., 483, 167 N. W., 816. As Lord Atkinson said in *Barnes* v. *Nunnery Colliery Co. Ltd.* (1912), App. Cas., 44, "A distinction must always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with his employment." See *Mt. Olive Coal Co.* v. *Industrial Com.,* supra.

The case at bar warrants the finding that the injured employee was hurrying to get from the treeing room to the lining and repairing room of the factory where he was employed by way of the ramp for the purpose of performing his regular duties. It was strictly within the scope of his employment to do this and, under the circumstances disclosed here, to do it ex-

peditiously. It is true that he could have gone a few feet further down to the ramp, turned around the end of the guard rail and with little delay and greater safety reached the place to which he was going, and to vault the rail may have been imprudent, perhaps negligent, but with its height only three feet and a drop on the other side but little more, for a wiry, active man in his forties his conduct can hardly be viewed as unreasonably reckless. We are of opinion that in vaulting the rail the employee here acted imprudently but did not take himself out of the scope of his employment.

The finding by the Industrial Accident Commission that the Petitioner's injury arose out of and in the course of his employment was based on evidence of probative value and the award of compensation confirmed in the Court below must be sustained.

Appeal dismissed.
Decree below affirmed with costs.

JOSEPH HERMAN

vs.

NETTIE A. GREENE & TRUSTEE.

PETER NELKIN ET AL.

vs.

NETTIE A. GREENE & TRUSTEE.

Cumberland. Opinion, September 20, 1943.

Bills and Notes. Fraud.

The defendant had the burden of establishing by clear and convincing proof that her signature on each of the notes sued upon was obtained by fraud. Inasmuch as the jury returned a verdict in each case for the defendant, they evidently decided that she had sustained the burden of proof.

The question before the Court, therefore, was whether the findings of the jury were clearly and manifestly wrong; and it appearing to the Court that the testimony of the defendant was incredible and that the evidence failed to show fraud, it was held that the verdicts of the jury in favor of the defendant were clearly and manifestly wrong.

ON MOTIONS FOR NEW TRIALS.

In each case exceptions were taken but after verdict for the defendant, the plaintiffs filed motions for new trials, thereby waiving their exceptions, as both the exceptions and the motions raised the same issues. Actions were on two promissory notes signed by the defendant Nettie A. Greene. Mrs. Greene claimed that she signed the notes under the misapprehension that they were receipts for property received by her in part payment of a note held by her. The jury returned, in each case, a verdict for the defendants. The plaintiffs filed motions for new trials. Motions sustained. New trials granted. The cases appear fully in the opinion.

Berman & Berman, Portland,

Sidney W. Wernick, for the plaintiffs.

Merrill & Merrill,

Harvey D. Eaton, for the defendants.

SITTING: STURGIS, C.J., THAXTER, MANSER, MURCHIE, JJ.

THAXTER, J. We are concerned here with two actions brought by different plaintiffs against the same defendant to recover on two promissory notes. In each case an exception was taken to the refusal of the presiding justice to direct a verdict for the plaintiff, and after a verdict for the defendant a general motion for a new trial was filed in each. By filing these motions the plaintiffs waived their exceptions as both the exceptions and the motions raise the same issue. We shall therefore consider only the motions.

Each note was made payable to Maurice L. Diamond and Mabel S. Early and for the same principal sum, $2,925.00, although this circumstance happens to be a mere coincidence. In the action brought by Herman the note was dated February 7, 1942 and was payable May 10, 1942 at the Federal Trust Company of Waterville, Me. In the other case the note was dated March 10, 1942 and was due May 15, 1942. In all other respects it was similar to the first. The notes were endorsed by the payees and by one Sam Diamond, a brother of Maurice, and were held by the respective plaintiffs as endorsees of Sam Diamond. The defendant does not deny having signed the notes but claims that her signature in each instance was obtained by fraud of which the endorsee, Sam Diamond, and likewise the plaintiffs had notice. It is set forth in the defendant's amended brief statement in the Herman case that Maurice L. Diamond and Mabel S. Early in May, 1941, persuaded the defendant to make a loan of $5,000.00 to a corporation known as Stewart's Inc. of which they were respectively the president

and the secretary; that for the loan of $5,000.00 they gave to the defendant a note of the corporation endorsed by them dated May 3, 1941, for the sum of $6,000.00 payable May 1, 1942; that on February 7, 1942 the defendant secured of Stewart's Inc. certain jewelry of the alleged value of $2,925.00 which sum it was agreed should be credited as part payment on the note of $6,000.00; that the said note being then in the defendant's safe deposit box in Waterville, Maine, it was agreed that the defendant should give a receipt for the value of the jewelry; that she signed the note which is the subject-matter of the suit because of the false and fraudulent representations of Maurice L. Diamond and Mabel S. Early that she was signing merely a receipt in the sum of $2,925.00, being the agreed value of the diamonds, which was to be treated as part payment on the note of $6,000.00, and that she reasonably believed that she was signing such receipt and not a promissory note.

The allegations in the brief statement with respect to the second note dated March 10, 1942 are identical.

The defendant was a widow who appears to have been possessed of a considerable amount of spare money and spare time both of which seem to have been used very unwisely. She had spent several winters in St. Petersburg, Florida. There she met Maurice Diamond and Mabel Early who conducted a diamond auction business under the name of Stewart's Inc. She had a friend by the name of William Ferguson, who was a guest at the hotel. The defendant, Ferguson, Diamond, and Mabel Early were much in each other's company. Diamond and Mabel Early invited them to dinners, took them out for automobile rides, and all four went to the dog races together. There were dances, birthday parties and New Year parties. Ferguson testified that he regarded Diamond as a fine man and still thought so at the time of the trial. Out of all these hours spent in inconsequential fun making their relationship became so close that Ferguson finally came to regard Diamond "just like a brother." During the daytime when the

dances were not in full swing and the dogs quite probably were resting for their next race, Ferguson and Mrs. Greene would attend the diamond auctions at Stewart's. It was just for fun and the auctioneer "was very comical." Such was the tawdry background of what finally blossomed into a business relationship. Diamond had a use for money in his business and Mrs. Greene had the money. She loaned to the corporation $5,000.00 taking therefor the note of $6,000.00 referred to in the brief statement. Six months later she loaned Diamond $2,000.00. Then from being for the most part of the season a spectator at the auctions she became an active bidder. On February 7, 1942 she purchased for $5,600.00 a bracelet and on March 10, 1942 a diamond ring for $4,400.00. In each instance she turned in in part payment other jewelry which she had previously bought and in each case the balance which she owed amounted to $2,925.00. The plaintiffs claim that she signed the two promissory notes for these amounts with the full knowledge of what she was signing and that her assertion that the payees or either of them led her to believe that these were receipts for amounts to be credited on the $6,000.00 note was false.

The defendant had the burden of establishing by clear and convincing proof that her signature on each of the notes in question was obtained by fraud. *Portland Morris Plan Bank* v. *Winckler*, 127 Me., 306, 143 A., 173. The jury has decided that she has sustained that burden. The question before this court on the general motions is whether that finding is clearly and manifestly wrong. If it is, all discussion as to whether the plaintiffs were holders in due course becomes superfluous.

The claim of the defendant, apparently with respect to the Herman note, is not that any trick was practiced on her by which one piece of paper was substituted for another when she signed. Although this particular allegation was set up in the brief statement, it was abandoned when she was called on to testify. She testified that after her successful bid for the jewelry, Maurice Diamond asked her to go into the back room

or office with him to sign a receipt, that she sat down there on one side of the desk or table, that he sat down on the other side, that he passed her a paper which she took and signed. She was not hurried and apparently had ample opportunity to have read it had she wished. The paper which she admits she signed is of the following tenor:

"N. P. 62658
1-30
$2925.00 *February 7th., 1942*
On May the 10th. 1942 after date *I* promise to pay to the order of *Maurice L. Diamond and Mabel S. Early*
Twenty nine hundred & twenty-five & . . . . No/100 Dollars
at The Federal Trust Co., of Waterville, Maine.
Value received
Nettie A. Greene
No. Due *5/10/42*"

She appears as the maker of a promissory note which she now says she had no intention of signing and was not supposed to sign. Realizing that some explanation was necessary under the circumstances, she put forth several versions of what happened, each, unfortunately for her, inconsistent with the other. In the first place she said that she signed merely a blank piece of paper, apparently intending to imply that she left it with Maurice Diamond to fill in and that he wrote in a promise on her part to pay money instead of an acknowledgment of a payment of money received by her. But this theory of what occurred had to be discarded by her when she was faced with the note which we now have before us. Obviously she did not sign a blank piece of paper. The words "after date," "promise to pay to the order of," "Dollars at," and "Value received" as well as "No." and "Due" at the bottom were printed. It was the ordinary printed form of a promissory note used in com-

mercial transactions. Finally forced to admit that these words must have been on the note when she signed it, she then first said that she read it but doesn't remember what was on it, and finally asks us to believe that she signed it without reading it at all, relying on Mr. Diamond's assurance that it was a receipt. There is nothing in what took place at the time of the signing to indicate any duress, any subterfuge, any attempt to conceal from her the writing on the particular paper which she signed. It was passed to her as she sat across the table from Mr. Diamond. All that she claims is that he told her it was a receipt. Would he attempt to deceive her as to its tenor and still furnish her with a full opportunity to read what was on it? As a matter of fact unless she signed it with her eyes shut, it is difficult to believe that she could have helped seeing what it was. That such a series of improbabilities could have happened once seems incredible. But we are asked to believe that exactly the same sequences of events followed a second time, when a month later she made a second purchase of jewelry, went into the same back office alone with Maurice Diamond, sat down at the selfsame table, was handed another note by Diamond, was given full time to read what she signed, and was told by him it was a receipt, and then that she signed it in that belief. Then we have, applicable to this transaction as to the first, her inconsistent versions of what she really did, firstly that the paper which she signed was blank, secondly that she didn't remember what was on it, and thirdly that she didn't in fact read it at all. Counsel do not tell us on which story of the defendant they intend to rely. Out of all the incredible story of what took place we are left with the suspicion that a fraud of some kind may have been practiced on the defendant but we can only guess at what may have happened. Conjecture does not take the place of proof. That some fraud may have been perpetrated is beside the point, if it is not the fraud which the defendant alleges and attempts to substantiate by proof.

The defendant had little conception of the value of money

or of its proper use. She certainly was no financial genius, as her friend Mr. Ferguson admits. But she was not quite the simpleton that she would have this court believe. She had received promissory notes for money which she had loaned. She knew what they looked like and she must have known that the words "promise to pay" were not the ones used in a receipt given for money to be credited to a debtor.

Counsel argue that the evidence is conflicting as to what took place at the time the notes were signed. The conflict is between the testimony of Sam Diamond and the defendant. Sam Diamond says that he was in the room when the notes were signed and that Mrs. Greene discussed the terms of at least one of the notes with Maurice Diamond before she signed it and mentioned the bank at which it should be made payable. But the fact that there is a conflict in the evidence does not make out a case, if the testimony on which a party relies is itself incredible. We can utterly disregard Sam Diamond's testimony and still the defendant fails.

Counsel for the defendant also calls our attention to Mrs. Greene's testimony that, after the second purchase when she came out of the back office with Maurice Diamond, he said to Mrs. Early: "We have Mrs. Greene almost paid up." If there were some independent, credible evidence that Mrs. Greene had signed a receipt or was led to believe by Diamond that she had done so, this evidence might carry some weight as corroboration. But without that, it proves nothing and is not necessarily inconsistent with the theory that Mrs. Greene signed a note which was to be used as a set-off against the note of Stewart's Inc. held by her.

There is an analogy between this case and *Strout* v. *Lewis*, 104 Me., 65, 71 A., 137. The action there was assumpsit on a written contract the terms of which were filled in on a printed form. The defense was that the defendant had been induced to sign it by the plaintiff representing to her that it was in fact something different from what its provisions expressed. The

case was tried before a jury who returned a verdict for the defendant. In sustaining a motion by the plaintiff for a new trial, the court said, page 67, with respect to the allegation of fraud: "The charge is a serious one and the law imposes on the defendant the burden of substantiating it by clear and convincing proof." Then as to the defendant's claim that she signed the paper without reading it, relying on the plaintiff's statement as to its contents, the court said page 68: "The inherent improbability of the defendant's version strikes one forcibly. She was a woman of mature years and of intelligence and it is highly improbable that she would have signed a contract with a comparative stranger without first learning its contents either by reading it herself or having it read to her."

Regardless of any conflict between the defendant's testimony and that of Sam Diamond and of the fact that neither Maurice Diamond nor Mrs. Early saw fit to testify, the burden was still on the defendant to prove fraud by evidence which it is possible to believe. We have nothing on the point but her own testimony. She gives us one version one minute and when faced with facts which cannot be controverted offers another explanation utterly inconsistent with the first, and neither of which can be accepted by reasonable men or women. This case as well as *Strout* v. *Lewis,* supra, show us that there are limits beyond which a jury may not go to save people from the consequences of their own folly. The verdicts are clearly and manifestly wrong.

Motions sustained.
New trials granted.

GEORGE R. BEANE *vs.* OSCAR HARTFORD.

BURTON GAY, PRO AMI. *vs.* OSCAR HARTFORD.

HARRY A. GAY *vs.* OSCAR HARTFORD.

Kennebec. Opinion, September 22, 1943.

Automobiles. Contributory Negligence.

Even though plaintiffs Burton Gay and Harry A. Gay might have been right as to their contentions that there were errors in the admission of testimony and the refusal of the presiding justice to give requested instructions, the fact established to the satisfaction of the Court that the plaintiff, Burton Gay was guilty of contributory negligence, barred their right to recover.

The passenger in an automobile is not barred by the negligence of the driver of the automobile in which he is a passenger from recovering for injuries due to the negligence of the driver of another car.

ON EXCEPTIONS AND MOTIONS FOR NEW TRIALS.

Actions by the plaintiffs Burton Gay and Harry A. Gay were for personal injuries, property damage and medical expenses. Action by plaintiff George R. Beane was for personal injuries. The jury found for the defendant in the actions by the plaintiffs Gay, and found for the plaintiff Beane and awarded damages to him. The plaintiffs Gay excepted and also moved for new trials. Plaintiff Beane moved for a new trial on the ground that the damages awarded to him were inadequate. Exceptions overruled. Motions for new trials dismissed. The cases fully appear in the opinion.

McLean, Southard & Hunt, by *Ernest L. McLean,* for the plaintiffs.

Locke, Campbell & Reid, by *Herbert E. Locke,* for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. There are involved here three cases based on negligence each growing out of the same automobile accident. Burton Gay, a minor, sues by his father as next friend to recover for personal injuries and for the loss of his automobile; Harry A. Gay, the father, seeks to recover for the loss of earnings of his minor son, and for expenses which he as parent has incurred and claims he will incur for medical treatment of his son's injuries; and George R. Beane who was a passenger in the Gay car seeks to recover damages for personal injuries. The cases were tried before a jury who found for the defendant in each of the Gay cases and for the plaintiff in the Beane case, assessing damages therein in the sum of $37.00. Each Gay case is before us on exceptions by the plaintiff and on a general motion for a new trial. The Beane case is brought forward on a motion by the plaintiff based on the ground that the damages are inadequate.

We shall consider first the Gay cases. The exceptions are (1) to the exclusion of testimony that route 202 over which the parties were driving was a "through" way; (2) to a portion of the charge concerning the knowledge of Burton Gay as to the intersecting road where the accident took place; (3) to the refusal of the presiding justice to give a requested instruction concerning the right of the operator of an automobile to pass another car at an intersection, and (4) to the refusal to give a requested instruction as to the presumption of negligence arising from the passing of another automobile at an intersection.

We shall not discuss these exceptions, for even though the plaintiffs might be right as to each contention made by them through their counsel, their right to recover is barred by reason of the contributory negligence of Burton Gay which we feel has been conclusively established.

In deciding the question of his negligence we shall consider

the evidence in the light most favorable to him. The defendant, Oscar Hartford, was driving easterly on route 202 on his own right-hand side of the highway at a speed which was not over forty miles an hour. At least that is the only inference from all the testimony on the point. As he approached route 106 which intersects 202 at a right angle, he braked his car and pulled over to the left in order to make a left turn into route 106. The evidence does not indicate that he at any time crossed the median line of 202. What he did was in preparation for making the turn, which, due to the events which immediately followed, was not made. He did not put out his hand to indicate that he intended to make a left-hand turn. The plaintiff, Burton Gay, had been following the Hartford car for a distance of about a mile. Hartford testified that when he first applied his brakes he was about 170 feet from the intersection. Beane, the passenger in the Gay car, gives the distance as 140 feet and we will accept his figure. At this time the Gay car was 100 feet behind the Hartford car. The Gay car, swinging to the left, passed the Hartford car as they entered the intersection. The Hartford car pulled to the right to avoid the plaintiff's car, crossed route 106, and stopped on the right side of route 202 about two car lengths beyond the intersection. The Gay car, swerving first to the left and then to the right turned over at least once in the highway and finally came to rest on top of the guard fence on the northerly side of route 202 at a point about 90 feet from the easterly side of route 106.

The plaintiff's contention is that the defendant suddenly braked his car and suddenly without warning turned to the left. This claim is negatived by facts which are undisputed. The defendant applied his brakes when he was 140 feet from the intersection. He was travelling not over 40 miles per hour and he did not stop until after he had passed through the intersection. He did bear to the left but appears not to have crossed the middle line of the road when the plaintiff's car went by him. When Gay knew or should have known that the

car ahead of him was slowing down, he had a distance of 240 feet in which to stop his car if necessary before he even reached the intersection. Instead of that he travelled a distance of at least 330 feet not counting the width of the intersecting way before he finally came to rest, and while going that distance his automobile rolled over at least once. The two cars never came into contact.

With respect to the conduct of Gay there are two possible inferences. He either was not keeping a proper watch of the car ahead of him so that he could without disaster to himself avoid colliding with it as it slowed down, or he was going at a grossly excessive rate of speed. As we view the case, it makes no difference whether there was an intersection there or not. Whichever inference we adopt it is clear that his negligence was a proximate cause of the accident and bars a recovery by him. Evidently the jury so figured and we do not see how they could have come to any other conclusion.

The case of the plaintiff Beane rests on a different basis. He was a passenger and the jury could properly have found that a recovery by him was not barred by the negligence of Gay. The motion for a new trial is addressed to us solely on the ground that the damages are inadequate. He had a doctor's bill of $2.00 and claims to have suffered a loss of $35.00 in wages. The jury assessed damages at $37.00. The claim is that they allowed nothing for pain and suffering. But Beane doesn't claim that he had any or that he was incapacitated from work during the next three days. He had two superficial cuts which required no stitches. He himself claims that they didn't amount to much. Under these circumstances we cannot say that the jury's judgment as to damages was clearly wrong.

Exceptions overruled.
Motions overruled.

INHABITANTS OF THE TOWN OF SANFORD.

vs.

INHABITANTS OF THE TOWN OF HARTLAND.

York. Opinion, September 23, 1943.

Paupers.

When supplies are furnished to a pauper, one notice by the town furnishing them authorizes recovery from the town chargeable for a period commencing three months before the notice and ending at the date of the writ, provided suit is seasonably brought.

Payment by the town chargeable of a bill for a portion of the expense incurred in the support of a pauper and the later billing of the balance does not change the rule so long as no action was instituted to collect the earlier bill.

ON EXCEPTIONS.

Action of assumpsit by the plaintiff town to recover for supplies furnished to a pauper alleged to have a pauper settlement in the town of Hartland. The supplies were furnished continuously from May 7, 1941 to April 7, 1942. Notice was given to the defendant town on May 10, 1941 and the plaintiff town, prior to July 12, 1941 incurred expenses amounting to $57.83, which expense was billed to the defendant town and later paid. At the time of payment the plaintiff town had incurred expense for further supplies, and subsequently for more supplies, the last item for which reimbursement was claimed being supplied on April 7, 1942. The defendant town raised no issue as to the items charged, but its contention was that after the payment of the bill rendered the effect of the notice was terminated and no liability would attach for subsequent expense except by the giving of a new notice. The Justice in the trial Court, acting without the intervention of a jury, gave judgment for

the defendant town because of alleged failure of notice. Plaintiff town filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Gendron & Gendron, for the plaintiffs.

Barnett I. Shur, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. This action of assumpsit, brought to recover money paid for the support of persons having a pauper settlement in the defendant town, was heard by the Justice presiding below without the intervention of a jury and comes to this Court on exceptions duly taken to his decision under right reserved therefor duly entered on the docket.

The decision excepted to is stated in the words:

"Judgt. for defendant because of failure of notice,"

but the nature of the insufficiency is not declared. A copy of a notice dated May 10, 1941, appears in the record as an Exhibit, and stipulation carries acknowledgment that it was received by the defendants "in due course of mail."

The stipulation establishes factually that the pauper settlement of the distressed persons named was in the defendant town, that all supplies listed had been furnished them on the dates alleged, and that the charges therefor were just and reasonable.

The writ is dated September 3, 1942. The account annexed opens and closes with items under dates of August 5 and December 31, respectively, both in the year 1941. Trial was at the October Term, 1942, and prior thereto the declaration was amended by adding charges on dates commencing January 6, 1942, and ending on April 7 in that year. The ad damnum was not increased.

The notice, addressed to and signed by, the Overseers of

the Poor of the respective towns, named three persons, a mother and two minor children, declared the latter to have been born in the defendant town on named dates, and after reciting that they had fallen into distress and been furnished relief, requested their removal or other provision for them. The statement:

> "The sums expended for their support up to this date are (see reverse side)"

appears in the notice, but no charges are there listed and this may indicate that no actual disbursements had been made. No question is raised, however, that the distress and the assumption of the burden thereof occurred prior to the date of the notice. Actual disbursement is not essential, *Inhabitants of Fayette* v. *Inhabitants of Livermore*, 62 Me., 229.

The notice does not disclose either the date on which the persons to whom the action relates fell into distress or that on which the first item of relief was furnished, nor are these items of information supplied either by stipulation or oral testimony. Allegation in the declaration is that the distress relates back to May 7, 1941, and it is stipulated that the defendants, subsequent to July 12, 1941, paid the plaintiffs the sum of $57.38, tendered and accepted in full for everything furnished up to and including the last named date. The plea was the general issue with a brief statement alleging failure to send a proper pauper notice.

The purpose of the notice required by statute, R. S. (1930), Chap. 33, Sec. 31, was early declared in this Court, *Inhabitants of Garland* v. *Inhabitants of Brewer*, 3 Me., 197, and the declaration therein made has been substantially reaffirmed within a few years, *Inhabitants of Turner* v. *City of Lewiston*, 135 Me., 430, 198 A., 734. Notices in varying forms have been held sufficient, *Inhabitants of Bangor* v. *Inhabitants of Deer-Isle*, 1 Me., 329; *Inhabitants of Kennebunkport* v. *Inhabitants of Buxton*, 26 Me., 61; *Inhabitants of Holden* v. *Inhabitants of*

Glenburn, 63 Me., 579. The notice in the instant case more than amply meets the minimum requirements that have been declared in these cases and others of like tenor. We apprehend that the decision of the Justice below could not have been based on a finding that the notice given was insufficient in form. It is stated in the bill of exceptions that the basis of the ruling was that the notice was not sufficient because of the payment of $57.38 already noted—"that a new notice should have been sent to the Town of Hartland following" such payment.

The law in this State has long required muncipalities to relieve destitute persons and permitted recovery therefor on proper notice to, and process against, the town in which they had a pauper settlement, *City of Bath* v. *Inhabitants of Harpswell,* 110 Me., 391, 86 A., 318; *Inhabitants of Fort Fairfield* v. *Inhabitants of Millinocket,* 136 Me., 426, 12 A. (2d), 173. This recovery embraces all supplies furnished during a period commencing three months prior to the notice and terminating when suit is commenced, not more than two years after the right of action accrued, *Inhabitants of Veazie* v. *Inhabitants of Howland,* 53 Me., 38; *Same* v. *Same,* 53 Me., 39; *City of Bath* v. *Inhabitants of Harpswell,* supra. This means, ordinarily, two months after delivery, but answer denying liability returned earlier has been held to accelerate both the right of action and the commencement of the period of limitation, *Inhabitants of Sanford* v. *Inhabitants of Lebanon,* 26 Me., 461; *Inhabitants of Robbinston* v. *Inhabitants of Lisbon,* 40 Me., 287.

Quotations may be selected from our reported cases which, standing apart from the contexts in which they appear, seem to read at variance with these established principles, but consideration of the facts adjudicated and careful reading of the opinions as a whole will disclose that none of them have been intended to change or qualify the generally accepted rules of law above stated.

In *Inhabitants of Cutler* v. *Maker,* 41 Me., 594, it is stated that the cause of action accrued "at the time of the delivery of the notice," and that the period of limitation then began to run. For this statement *Inhabitants of Camden* v. *Inhabitants of Lincolnville,* 16 Me., 384 (and another case not important to the present discussion) are cited as authority. In the named case it was not material whether the control date was that of the delivery of the notice or two months thereafter, and we believe it must be true, as declared by Mr. Justice Walton in *Inhabitants of Veazie* v. *Inhabitants of Howland,* supra (the second of the cited cases between these parties), that the statement was an inadvertence "into which the learned Judge who drew the opinion was probably led by the erroneous notes of the reporter." Reference is to the fact that the headnote in the earlier case interprets that decision in accordance with its citation in the later one.

City of Bangor v. *Inhabitants of Fairfield,* 46 Me., 558, presents an additional illustration. That opinion quotes from an unidentified source that the right to reimbursement is limited to " 'expenses incurred within three months next before written notice given.' " The language is suggestive of that part of the pertinent statute, R. S. 1857, Chap. 24, Sec. 24, reading:

> "the expenses whereof and of their removal incurred within three months before notice given to the town chargeable, may be recovered,"

yet the right undoubtedly covered the period commencing three months before notice and extending until the period of limitation expired. Later declaration in this opinion is that when payment is made by the town notified, a new notice is necessary to recover for further supplies. The action under consideration was not commenced until after the lapse of more than two years and five months from the date of delivery of the statutory notice, and was barred even for items dis-

bursed within two years of the date of the writ, *Inhabitants of Veazie* v. *Inhabitants of Howland,* supra (again the second cited case). Quoting Mr. Justice Walton in that case once again, it does not seem that the remarks of the writer of the opinion, or either of them, would "warrant the inference that the Court intended to . . . establish a new rule."

The defendants rely upon comment in *City of Bangor* v. *Inhabitants of Fairfield,* supra, that payment of the amount due when notice was given barred recovery for later supplies except on the basis of a new notice, and its substantial repetition in the recent case of *Inhabitants of Turner* v. *City of Lewiston,* supra. Recovery in the last named case, sought for expense incurred under P. L. 1935, Chap. 91, was denied because no notice had been given. Reading of the entire opinion makes it apparent that there was no intention to change the principle of law controlling in the instant case.

Notice authorizes recovery for expenses incurred in the relief of destitute persons for three months prior thereto and until the expiration of two years beyond the date when the right of action accrues unless its effectiveness is terminated by removal of the pauper, *Inhabitants of Greene* v. *Inhabitants of Taunton,* 1 Me., 228; by other action such as undertaking the care of the pauper named, *Gross* v. *Inhabitants of Jay,* 37 Me., 9; or by the institution of process, *Inhabitants of Veazie* v. *Inhabitants of Howland,* supra (53 Me., 39); *Inhabitants of East Machias* v. *Inhabitants of Bradley,* 67 Me., 533. The ruling that payment of a bill rendered for some supplies furnished terminated the effect of the notice was erroneous, *City of Bath* v. *Inhabitants of Harpswell,* supra.

Exceptions sustained.

HOME INSURANCE CO. *vs.* EARL W. BISHOP.

Penobscot. Opinion, October 2, 1943.

Bills and Notes. Subrogation. Insurance.

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser and if the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. R.S. 1930, Chapter 164, Section 64.

A holder in due course is a holder who has taken the instrument under the following conditions (1) that it is complete and regular upon its face; that (2) he became the holder of it before it was overdue and without notice that it was previously dishonored if such is the fact; that (3) he took it in good faith and for value; and (4) that, at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Subrogation is the substitution of one person in the place of another. It may arise by contract or by operation of law.

The right of subrogation is not restricted to the remedies which the creditor had against the principal debtor, but extends to all the remedies which he had against the principal and others liable for the debt. In the instant case, the makers of the note, by burning the property on which there was insurance to cover its value, did not thereby secure immunity from payment of their note. Neither did the defendant who indorsed for their accommodation. Though technically an irregular indorser, as defined in R.S., c. 164, #64, and entitled to demand a notice of dishonor, which was given in this case, he is an indorser with all that term implies and as defined in R.S., c. 164, #66.

ON EXCEPTIONS.

Action by the plaintiff to recover on a promissory note indorsed by the defendant before delivery to the payee. The defendant sold an automobile to certain parties and received a partial payment. The balance of the purchase price was provided for by a conditional sale contract and by a promissory note of the purchasers given to Darling Motor Co., Inc., and was indorsed in blank by the defendant before delivery. The

payee secured insurance from the plaintiff against loss by fire payable to any holder of the note. Subsequently the payee assigned its rights to the Commercial Credit Corporation. Thereafter the automobile was intentionally destroyed by fire by the conditional vendees. The plaintiff paid the Commercial Credit Corporation the balance due on the note and the Credit Corporation assigned all its rights under the conditional sale contract to the plaintiff. The defendant contended that the plaintiff was not a holder in due course of the note insofar as the defendant was concerned. The presiding Justice acting without a jury rendered judgment for the defendant. The plaintiff excepted. Exceptions sustained.

A. M. Rudman, for the plaintiff.

Arthur L. Thayer, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This is an action upon a negotiable promissory note brought by the plaintiff as indorsee against the defendant as indorser before delivery of the note to the payee. Hearing was before the presiding Justice without a jury. The facts were not in dispute. The defendant relied solely upon the contention set up in his pleadings that the plaintiff

> "is not a holder in due course of the note declared on, in-so-far as the defendant is concerned."

The presiding Justice sustained this contention and rendered judgment for the defendant. The case comes forward upon exceptions to this ruling.

On July 13, 1940 the defendant, Earl W. Bishop, sold to Byron and Annie O'Riley an automobile and received a partial payment. The remainder of the purchase price was provided for by a conditional sale contract and by note of the condi-

tional vendees for $210.48, payable in twelve monthly installments. The note was given directly to Darling Motor Co., Inc. It was also indorsed in blank by the defendant, Bishop, before delivery.

The payee of the note secured an insurance policy to be issued by the plaintiff Company, protecting the conditional vendees and any holder of the note from loss by fire. The amount of the premium paid by the payee was included in the note as a part of the debt of the conditional vendees. The rights of the Darling Motor Co., Inc. in the conditional sale contract were then assigned by it to the Commercial Credit Corporation and the note was also transferred by indorsement.

Shortly after these transactions, the automobile was intentionally destroyed by fire by the O'Rileys, and no part of the insurance was paid to them because their own tortious acts created a forfeiture of their rights. The presiding Justice found that

> "The Home Insurance Company did pay, by virtue of its contract, to Commercial Credit Corporation 'as its interest appeared' the balance due on the note, viz. $150."

Upon receiving this payment, the Commercial Credit Corporation indorsed the note without recourse and delivered it to the plaintiff Insurance Company, together with formal assignment of all its right, title and interest in the conditional sale contract.

Upon this state of facts, the presiding Justice ruled

> "The plaintiff Insurance Co. is entitled to be subrogated to all the rights of the mortgagee (conditional sale vendor) as against the mortgagors (the O'Rileys as conditional sale vendees). It has no claim, however, against the defendant as endorser, under the circumstances of this case.... My interpretation of the Uniform Negotiable Instrument Act renders it necessary for me

to render judgment against the contentions of the plaintiff."

The defendant, Bishop, signed the note for the accommodation of the makers. By his indorsement before delivery, he became an irregular indorser and his liability as such is defined in R. S., c. 164, § 64 (N. I. L.), which, so far as pertinent to this case, reads as follows:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:

(1.) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties."

Thus is presented the sole issue, whether under these facts the plaintiff is a holder in due course of the note in suit so far as the present defendant is concerned.

The definition of a holder in due course, is found in R. S., c. 164, § 52, as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

(1.) That it is complete and regular upon its face;

(2.) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

(3.) That he took it in good faith and for value;

(4.) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The determination of whether the present plaintiff was a holder for value depends upon the application of the doctrine

of subrogation. This principle is recognized by the ruling of the presiding Justice that the plaintiff is entitled to the right of subrogation, which he limited, however, to recourse against the makers primarily liable upon the note. The plaintiff maintains that payment of the amount remaining unpaid on the note, though made for the purpose of discharging its obligation as insurer of the property for which the note was given, entitled the Insurance Company to be subrogated to the rights of the previous holder against all prior parties to the instrument.

The right of subrogation may arise by contract or by operation of law. The insurance policy in this case, while not incorporated in the record, is according to the findings of the presiding Justice, "admitted to be in usual form to protect the O'Rileys and the holder of the note with his accompanying conditional sale contract." Our statute, R. S., c. 60 § 4, provides that:

> "No fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form."

with certain modifications not here of concern. This standard form is found in § 5 of the Act and contains a subrogation clause in which is included the provision that

> "... whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay to the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

It might be claimed, however, that this provision was without application to insurance effected upon personal property, as the provision quoted is part of a paragraph which begins:

> "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate;"

It is not necessary to determine whether the policy provision is thus limited to insured real estate, because the right of subrogation as stated in the policy is essentially the same as that which arises by operation of law under the circumstances of this case.

In *Leavitt* v. *Railway Co.*, 90 Me., 153 at 160, (37 A. 886), our Court said:

> " . . . an insurer who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who for any other reason is liable therefor."

It appears to be the reasoning of the Court below that the makers of the note, who are primarily liable thereon, by their tortious act in burning the automobile, caused the loss; that their indorser, the defendant, was free from fault, and the doctrine of subrogation should not be extended to include an action against him, but should be restricted to any one who is responsible for the wrong.

Yet our Court has said in *Stevens* v. *King*, 84 Me., 291, 24 A. 850, 851, as to the doctrine of subrogation:

> "It ignores the form and looks to the substance. It construes payment to be purchase and purchase to be payment, as justice may demand. It substitutes one person for another or property for property."

If the Insurance Company is substituted for the mortgagee and in legal effect has purchased its rights, then it follows that it is entitled to the mortgage and the note secured thereby as

a holder for value, with all the rights incident thereto. In other words, the Insurance Company is substituted for the mortgagee and is entitled to the securities held by it.

In *Leavitt* v. *Railway Co.*, supra, the Court quotes from *Jackson Co.* v. *Bolyston Mutual Ins. Co.*, 139 Mass., 508, 2 N. E. 103, 104, 52 Am. Rep. 728, in which it was held that:

> "Subrogation is the substitution of one person in place of another, whether as a creditor or as the possesser of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. This right does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other."

The rule is stated thus in 25 R. C. L., Subrogation, § 10:

> "The right of subrogation is not restricted to the remedies which the creditor had against the principal debtor but extends to all the remedies which he had against the principal and others liable for the debt." Citing *American Bonding Co.* v. *National Mechanics Bank*, 97 Md., 598, 55 A. 395, 99 A. S. R. 466 and note. See also 13 Ann. Cas. 429.

Subrogation is an equitable principle. The makers of the note, by burning property on which there was insurance sufficient to cover its value, did not thereby secure immunity from payment of their note. Neither did the defendant, who indorsed for their accommodation. Though technically an irregular indorser and entitled to demand and notice of dishonor, which was given in this case, he is an indorser with all that term implies. *Ingalls* v. *Marston*, 121 Me., 182, 116 A. 216. His obligation on the note is that

> "on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be

dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it." R. S., c. 164, 166.

It is the opinion of the Court that this plaintiff is a holder for value and the entry will be

Exceptions sustained.

STATE OF MAINE *vs.* CARL E. ALQUIST

Cumberland. Opinion, October 2, 1943.

Criminal Law. Abortion.

When the respondent takes no exception but relies upon a motion, the appellate court will not order a new trial under any circumstances when the verdict is manifestly just.

In the instant case a careful review of the charge of the presiding Justice showed that the applicable principles of law were correctly given and that no right of the respondent was prejudiced by the charge in its entirety.

ON EXCEPTIONS.

The respondent was convicted of procuring, for a required fee, the miscarriage of a pregnant woman when such was not necessary for the preservation of her life. His motion for a directed verdict was denied. The respondent claimed that the judge's charge was prejudicial to him and that he did not have a fair trial. Exceptions overruled. Judgment for the State.

Richard S. Chapman, County Attorney,

Daniel C. McDonald, Assistant County Attorney, for the State.

Frank T. Powers,

Walter M. Tapley, for the respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

PER CURIAM.

The record in this case discloses ample and sufficient evidence to prove beyond a reasonable doubt that the respondent, for a required fee, procured the miscarriage of a woman pregnant with child, by the use of a catheter, and that such use was not necessary for the preservation of the life of the mother. The motion for a directed verdict for the respondent was properly denied. The exceptions to such denial are without merit.

Although no exceptions were taken to the charge of the presiding Justice, complaint is now made that it was prejudicial to the respondent and that he was not accorded a fair trial.

The appropriate practice in both civil and criminal cases is to present errors of law to this Court by a bill of exceptions, and a departure from this practice is not to be encouraged. *State* v. *Wright,* 128 Me., 404, 148 A. 141.

When the respondent takes no exceptions but relies upon a motion, the appellate court will not order a new trial under any circumstances when the verdict is manifestly just. *Ritchie* v. *Perry,* 129 Me., 440, 445, 152 A. 621.

A careful review of the charge of the presiding Justice shows that the applicable principles of law were correctly given and that no right of the respondent was prejudiced by the charge in its entirety.

Exceptions overruled.
Judgment for the state.

WALTER W. HOLMES

vs.

NORA H. FRASER, EXECUTRIX OF

ESTATE OF HENRY S. PINKHAM.

Penobscot. Opinion, October 4, 1943.

Executors and Administrators. Notice of Claims.

The essential requirements of notice of claim against the estate of a deceased person are that the notice shall distinguish with reasonable certainty the claim from all other claims and give such information concerning the nature and amount of the demand as will enable the representative to act intelligently in approving or rejecting it. A substantial compliance with the statutory requirement is sufficient.

In the instant case the notice filed in the Probate Court complied substantially with the requirements of the statute.

At most, the objection made to the notice in the instant case was technical and technicalities are not favored in such proceedings.

ON REPORT ON AGREED STATEMENT OF FACTS.

Suit was brought by plaintiff against the defendant in her capacity as Executrix of the estate of one Pinkham upon a promissory note alleged to have been owed by the deceased. The notice of the claim filed in the Probate Court contained a copy of the original note referred to as the "annexed note." Defendant contended that the claim was not properly filed in that the affidavit described the claim as the "annexed note" whereas it was not the original note but a copy thereof. The sole issue in the case was whether the notice of the claim filed complied with the requirements of the statute. Judgment for the plaintiff. The case fully appears in the opinion.

Randolph A. Weatherbee,

E. A. Weatherbee, for the plaintiff.

C. J. O'Leary,

Atherton & Atherton, for the defendant.

CHAPMAN, J. The above cause comes to this Court on an agreed statement of facts certified by the Justice presiding in the Superior Court as containing questions of law which are in his opinion of sufficient importance for the same to be reported and determined in this Court. By stipulation of the parties, if this Court decides for the plaintiff upon the issue presented, judgment is to be for the plaintiff for $210.45 and costs; otherwise judgment is to be for the defendant.

According to the agreed statement the defendant was the qualified executrix of the estate of Henry S. Pinkham, whose will was probated in Penobscot County. Suit was brought by the plaintiff upon a promissory note alleged to have been that of the executrix's deceased. Further allegation was made in plaintiff's declaration of the filing of the claim in the Probate Court in accordance with R. S. 1930, Chap. 101, Sec. 14.

The sole issue presented by the stipulation of the parties is whether the claim of the plaintiff was filed in the Probate Court in accordance with the provisions of the statute named. The affidavit described the claim as the "annexed note and interest." "The annexed note" was typewritten as to body and signature and was a copy of the original note declared upon in plaintiff's writ.

The defendant contends that the claim was not properly filed, in that the affidavit described the claim as the "annexed note," whereas it was not a note, but a copy thereof.

R. S. 1930, Chap. 101, Sec. 14, reads as follows:

> "All claims against estates of deceased persons, . . . shall be presented to the executor or administrator in

writing, or filed in the registry of probate, supported by an affidavit of the claimant, or of some other person cognizant thereof, ..."

Statutes similar in substance exist in many jurisdictions and the courts have been generally in agreement as to the requisites of such notice. It has been held that the notice so filed shall distinguish with reasonable certainty the claim from all other similar claims and give such information concerning the nature and amount of the demand as will enable the representative to act intelligently in approving or rejecting it; and that a substantial compliance with the statute is sufficient.

Doolittle v. *McConnell,* 178 Cal., 697, 705, 174 P. 305;
Roth v. Ravich, 111 Conn., 649, 151 A. 179, 74 A.L.R., 364;
Furst & Thomas v. *Elliott,* 56 Idaho, 491, 56 P. (2d), 1064;
Estate of Beyer, 185 Wis., 23, 27, 200 N. W. 772;
State Bank of Orlando & T. Co. v. *Macy,* 101 Fla., 140, 133 So. 876, 78 A.L.R., 1119;
Henderson, Ex'r. v. *Ilsley,* 11 Smedes & M., 9 (Miss.); 49 Am. Dec. 41.

Our own court has held to the same effect.

Palmer's Appeal, 110 Me., 441, 447, 86 A. 919;
Fessenden v. *Coolidge,* 114 Me., 147, 95 A. 777;
Grant v. *Choate & Simmons,* 133 Me., 256, 259, 176 A. 289;
Eddy, et al v. *Starbird,* Adm'r., 135 Me., 183, 192 A. 702.

We believe that the notice in the instant case complied substantially with the requirements of the statute. We cannot see how the executrix could be misled as to the identity of the claim nor as to its nature. The statement filed could not otherwise than convey the information that the plaintiff relied upon a note, the verbatim wording of which was sufficient to distinguish it from any other claim. That the instrument annexed

was a copy, rather than the original was apparent from the fact that it was wholly typewritten, inclusive of the signature. At most, the objection raised is technical and technicalities are not favored in such proceedings. *Swan, et als, Appelants,* 115 Me., 501, 99 A. 449.

No case presenting the same state of facts has been cited, either by plaintiff or defendant, and we find no such case; but it is not entirely unheard of for a printed or typewritten copy of an instrument to be referred to as the instrument itself. Examination of opinions in reported cases will disclose that justices have sometimes taken such license. We venture to say that no one has been misled thereby.

Because of these rulings and the stipulation of the parties the entry must be:

Judgment for Plaintiff in the sum of $210.45 *and costs.*

CITY OF BANGOR *vs.* INHABITANTS OF ETNA.

Penobscot. Opinion, October 15, 1943.

Paupers. Reference and Referees.

A person who has a pauper settlement in a town can acquire a new settlement in another town only by having his home in such other town for five successive years without receiving supplies as a pauper. R. S. 1930, Chapter 33, Section 1, Subdivision VI.

The Legislature has the power to alter as well as enact statutes with respect to paupers, their settlement and the liability of towns to provide for them.

It is within the power of the Legislature to make orders and resolutions without any purpose or intention to abrogate, annul or repeal any existing general law. In the instant case, there is no language in the Legislative Resolve relied upon by the plaintiff which impliedly annuls the effect of the general law.

In the instant case, the findings of fact by the referee had the support of credible evidence and his decision was, therefore, final.

ON EXCEPTIONS.

Action by the City of Bangor to recover from the town of Etna for pauper supplies furnished to persons which plaintiff claimed had their pauper settlement in Etna. The defendants claimed that, though the paupers had formerly had a pauper settlement in Etna, they had lived in Bangor for more than five years without receiving pauper relief. The referee found, however, as a fact, that the pauper supplies were furnished to the paupers within the five year period and hence that the paupers had not acquired a pauper settlement in Bangor. The report of the referee was accepted in the Superior Court. The defendant excepted. Exceptions overruled. The case fully appears in the opinion.

B. W. Blanchard, for the plaintiff.

W. F. Jude, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This is an action to recover for pauper supplies furnished to Arthur M. Clewley, his wife and two minor children from December 19, 1940 to April 15, 1942, and amounting to $620.17. It was heard before a Referee upon an agreed statement of facts. The award was for the plaintiff. The report of the Referee was accepted against objections, and the case now comes forward on exceptions. It is not in controversy that pauper supplies, during the period and to the amount designated, were furnished and that the statutory requirements relative to notice and demand were complied with.

The defense is that, at the time the supplies were furnished, Clewley did not have a pauper settlement in the defendant town. This contention is based upon two propositions. The first is that, although originally his settlement was in Etna, he had acquired a new one in Bangor.

The agreed statement of facts discloses that Clewley was born in Etna November 16, 1896 and lived there with his parents during his entire minority; that he thus obtained a derivative pauper settlement in Etna upon reaching his majority on November 16, 1917. He continued to live in that town for approximately 13 years thereafter. Consequently, he retained his pauper settlement in Etna during that period. The settlement continued in Etna unless a new settlement was acquired by Clewley. R. S., c. 33, § 1, Par. II, as amended. *Milo* v. *Gardiner,* 41 Me., 549. The only method under the statute as applied to the circumstances of this case, by which he could have acquired such new settlement, is found in R. S., c. 33, § 1, Par. VI:

"A person of age, having his home in a town for five successive years without receiving supplies as a pauper, directly or indirectly has a settlement therein."

The record discloses that the pauper moved from the town of Etna September 30, 1930, and after living in the towns of Carmel and Veazie for short periods terminating in March 1932, went with his family to live in Bangor, and remained there until July 1, 1937, a period of more than five years. He then lived in Brewer for less than two months and returned to Bangor in August 1937, where he has since remained. It appears, however, that the City of Bangor furnished him and his family with supplies from May 10, 1932 to January 11, 1933, and at various intervals since that time until the period beginning December 14, 1940, involved in the present suit.

The defendant contends that the proof is insufficient to show that the supplies furnished during the earlier period named, from May 1932 to January 1933, were pauper supplies, but the Referee decided this question of fact in favor of the plaintiff, and there is justification for the finding. This contention fails.

The second proposition upon which the defendant relies is that the status of Clewley and his family was created, fixed or determined as that of State paupers by virtue of c. 80 of the legislative Resolves for the session of 1931. The first paragraph of this Resolve reads as follows:

"Resolved: That there be and hereby is appropriated to be paid to the cities, towns, counties and persons hereinafter named the sum set opposite their respective names, amounting in the aggregate to the sum of eighteen thousand, two hundred six dollars and seventy-three cents, being the amounts recommended by the committee on claims presented to said committee."

Then follows a list of 66 items and included in the list is:

"Town of Etna to reimburse for support of Arthur M. Clewley and family, state paupers, $628.97"

While the great majority of items are for reimbursement to various towns, cities and plantations for support of named individuals designated as state paupers, there are also items for reimbursement for support of certain Indians and for payments to hospitals and physicians for treatment of Indians and to a town for the support and burial of an unknown person. It is apparent that the procedure followed as a basis for the resolve was the presentation to the legislative committee of claims by the various municipalities and individuals that they should be reimbursed or compensated for supplies and services to individuals whom they represented as having no pauper settlement in any town; that the committee on claims accepted the representations of the claimants and the Resolve was passed.

In the particular case of Clewley, the record now before us clearly demonstrates that he was not a state pauper. He lived all his life until September 30, 1930, preceding the legislative session of 1931, in the town of Etna. The claim presented by the town was passed upon by the committee, submitted to the legislature and approved by the Governor April 2, 1931. Evidently the sum of $682.97 had been paid out for pauper supplies furnished to Clewley before he ever left Etna, or in any event, within a very few months thereafter. The assumption by the committee and the legislature that Clewley was a state pauper was without factual basis. It did not have the force and effect of a judicial determination.

There is discussion in the brief for the plaintiff that the resolve was repugnant to the constitution; that it was an undertaking by the legislature to exercise judicial power or an attempt to fix the status of a person as a state pauper by a mere resolve.

In the opinion of the Court, the constitutionality of the

Resolve is not in issue because it is our conclusion that the legislature did not undertake to create or fix a status for any of the individuals named therein. The Resolve was merely an appropriation to reimburse municipalities and individuals for expenditures upon claims presented and approved by the committee on claims. It was not a legislative enactment. It was purely an order directing the disbursement of certain State funds for particular purposes.

It is within the power of the legislature to make such orders and resolutions, without any purpose or intention to abrogate, annul or repeal any existing general law. For illustration, we find that the same legislature appropriated funds by specific resolves, directing the superintendent of public buildings to hang the picture of an eminent citizen in an appropriate position in the State House; to purchase copies of histories of various towns; to compensate an individual for damages to his automobile by collision with a deer; to compensate a man for capturing escaped prisoners; to empower the Governor to accept and deposit in the capitol a Greek flag. Such actions by the legislature are within its wise discretion and judgment, but are administrative in character.

> "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case." Opinion of Justices, N. H., 33 A. 1076.

Blackstone in his Commentaries, defining law as "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong," proceeds to say:

> "And, first, it is a *rule*: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal." Vol. 1, 44.

We are not to be understood as saying that a resolution passed by both branches of the legislature and approved by the Governor does not have the force of law to accomplish the intended purpose which, in this instance, was the payment of sums of money to various towns.

In *Moulton* v. *Scully*, 111 Me., 428 at 447, 89 A. 944 at page 953, the claim was made that a resolution passed by the legislature in favor of the adoption of an address to the Governor for the removal of a sheriff was a legislative enactment and was within the scope and contemplation of the constitutional referendum provision which prevented the Resolve from having any effect until ninety days after the recess of the legislature. The Court said:

> "The fallacy of the claim lies in the failure to distinguish between the Legislature as a law making body and the Legislature as an impeaching or addressing body. . . . The two are absolutely distinct and the referendum applies to the one but not to the other."

Before the adoption of the initiative and referendum amendment to the Constitution, all public laws and all private and special laws contained as an enacting clause:

> "Be it enacted by the Senate and the House of Representatives in Legislature Assembled."

Under Article XXXI of the constitutional amendments relating to the initiative and referendum, the clause now reads:

> "Be it enacted by the people of the State of Maine."

Uniformly throughout the history of legislative procedure in Maine, resolves have carried no enacting clause.

> "The chief distinction between a resolution and a law seems to be that the former is used whenever the legislative body passing it wishes to merely express an opinion

> as to some given matter or thing, and is only to have a temporary effect on such particular thing; while by the latter it is intended to permanently direct and control matters applying to persons or things in general." *Conley* v. *U. D. of Confederacy,* 164 S. W., 24, 26 (Tex. Civ. App.)

We agree with the statement of the Vice Chancellor in *Ex parte Hague,* 104 N. J. Eq. 31, 144 A. 546 on pp. 559-560 that it is not every act, legislative in form, that is a law. An appropriation bill, for instance, is not a law in its ordinary sense. Such a bill pertains only to the administrative functions of government. A joint resolution or resolve, is often merely a rule or order for the guidance of the agents and servants of the government.

It is true that the legislature can alter as well as enact statutes, with respect to paupers, their settlement and the liability of towns to provide for them. *Rockland* v. *Inhabitants of Lincolnville,* 135 Me., 420, 198 A. 744. Changes have been made from time to time since the enactment of the original pauper laws in 1821 (ch. CXXII). The statutes so enacted prescribe fixed general rules and classifications and the

> " . . . burdens thus imposed are deemed to be of a general character, upon an average and in the long run operating with equal fairness upon all the cities and towns in the state. *Appleton* v. *Belfast,* 67 Me., 579.

There is no language in the legislative resolve relied upon and there is nothing inherent in or disclosed by it which impliedly annuls the effect of the general law with respect to a particular person.

Exceptions overruled.

MINNIE C. TOZIER

vs.

ANDREW J. PEPIN AND ALYCE S. PEPIN.

Kennebec. Opinion, October 16, 1943.

Contracts. Reformation of Instruments. Appeal.

The law is established that the decision of a justice of the Supreme Court, sitting in equity, in so far as it is based upon the determination of factual issues, should not be reversed unless clearly wrong.

When parties to a trade have variant understandings of it, relief should take the form of cancellation rather than reformation.

Although mistake by one party to a contract might be ground for rescission or refusal of specific performance, it cannot be a ground for alteration of the terms thereof.

On the record, in the instant case, the Justice below would not have been warranted in ordering reformation of the bond in accordance with the prayer stated in the bill.

ON APPEAL.

Suit in equity by the plaintiff to reform a bond for a deed.

The bond prepared by the real estate agent of the plaintiff, to evidence a trade negotiated between his salesman and the defendants, and conditioned on the payment of $3,400 to her by the defendants over a term of years, carried no reference to interest, nor did a separate memorandum evidencing defendant's promise to pay the sum named in amounts as specified in the bond.

Plaintiff's agent, and the salesman of the latter, testified that the trade contemplated interest at 5%, but the agent alone claimed that the method of payment was definitely fixed and was to be by deductions from the monthly payments designated in the bond, the excess over interest on each payment to

be applied on the principal. Defendants insisted that the bond accurately set forth the terms agreed upon, and that interest was not mentioned during the negotiations. Appeal denied. Decree below affirmed. The case fully appears in the opinion.

McLean, Southard & Hunt, for the plaintiff.

Locke, Campbell & Reid, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. This is an appeal from the decision of a Justice of the Superior Court sitting in equity. In so far as it is based upon the determination of factual issues, the law is established that it should not be reversed unless clearly wrong. This principle was declared in *Young* v. *Witham,* 75 Me., 536, and has been followed in a long line of decisions in this Court, one of the last of which is *McDonough* v. *Portland Savings Bank et al.,* 136 Me., 71, 1 A. (2d), 768.

The bill as filed sought in the alternative to have a bond for a deed "rectified and reformed in accordance with the actual bargain and agreement for sale and conveyance," or declared forfeited because of "defendants' failure to comply with . . . the terms as set forth," but counsel for the plaintiff expressly declared in their brief and at oral argument that the question of forfeiture "is not being pressed on this appeal," so that we give consideration only to whether denial of the claim for reformation of the instrument was proper.

The pleadings, disregarding a demurrer inserted in defendants' answer upon which no ruling was made, seem to present very definite issues of fact. Plaintiff's allegations briefly summarized are that the agreement intended to be expressed in the bond was for the sale of property at a price of $3,400 "with interest on all unpaid balances" at the rate of 5% per annum, with each monthly payment applied first to interest and then

to principal, and that the interest provision was omitted from the bond by mutual mistake. All this, except the $3,400 price, the defendants deny and assert that the transaction contemplated payment "in monthly installments without interest" and that plaintiff's salesman induced them to purchase the property, in part, by representation that on the agreed schedule of payments they would "own the place" in nine years.

There is very definite conflict of testimony upon both factual issues. Plaintiff's real estate agent and his salesman declare that interest was mentioned, discussed and agreed upon at a stated rate of 5%. The salesman does not claim that the method of computation and times of payment were discussed, but the agent supports the exact allegation of the bill that each monthly payment was to be applied first to interest, with the excess used in reduction of principal. As to whether a term of nine years was stated, the conflict is between the defendants and the salesman alone. The agent saw nothing of the defendants until the "final offer of $3,400 with thirty dollars a month was made."

The decree presents no factual finding in terms but recites merely that the bill "be dismissed without costs." The plaintiff argues therefore that it may be based either on acceptance of the testimony presented by the defendants as true, in which case it entirely lacks support in *credible* evidence, or on misinterpretation of the legal principle which governs cases where a written instrument is sought to be reformed. Either claim, substantiated, would demonstrate that the Justice below decided a question of law and exclude operation of the principle declared in *Young* v. *Witham,* supra.

Plaintiff's contention that the evidence of the defendants is not *credible* is based entirely on the fact that they negotiated with Augusta Savings Bank to arrange a mortgage on the property, presumably to pay the plaintiff in full and secure her conveyance, before any issue arose about the payment of interest. Assertion is that this shows conclusively, contrary to their

sworn testimony, that they must have expected to pay interest to the plaintiff and were seeking a more convenient arrangement, and that common sense is outraged by the suggestion that when purchasing property by instalment payments without interest, they would seek to negotiate a mortgage with its inevitable interest requirement.

There is nothing abnormal in the trade to which the defendants depose. They sought the plaintiff's agent, not to buy a house, but to rent one. They were persuaded to purchase by the salesman, although his direct testimony seems designed, whether or not intentionally, to create the impression that they approached him intending to buy. Against an asking price of $3,800, they offered $3,500, with payments of $25 per month. When a monthly minimum of $30 was suggested, the defendant Andrew J. Pepin said he would pay $3,400. The plaintiff preferred this. So much is beyond dispute, as also that the defendants were to pay taxes from the date of their trade, carry insurance, and reimburse the plaintiff for the insurance then prepaid, although this last item was not mentioned in the bond. It cannot be said, as matter of law, that the trier of the fact might not accept the testimony of the defendants as representing in truth their understanding of the trade made. They were committed by the terms of the bond, as the Chief Justice noted at oral argument, to the arrangement for a mortgage at some time during its life.

It would require more than a modicum of credulity to accept the testimony offered on behalf of the plaintiff. Her agent had dealt in real estate for many years and was experienced in the preparation of bonds and other title documents. He prepared the bond and a separate instrument containing defendants' promise to pay. The essential parts of these documents read, respectively, that the $3,400 price is payable:

"$50.00 on delivery of this bond, and $30.00 Oct. 1st., $30.00 Nov. 1st., $30.00 Dec. 1st., and $50.00 Dec. 10th.,

> and Jan. 1st., 1942 $30.00, Feb. 1st., $30.00, March 1st., $30.00, Apr. 1st., $30.00 and Apr. 10th. $75.00, and May 1st., and the first day of each month thereafter $30.00 or more until a suitable amount has been paid, when a deed will be passed and mortgage arranged,"

and:

> "in amounts as specified in said bond."

It might not be difficult to believe that a simple provision for interest at 5%, even with recital that it be payable in annual, semi-annual or quarterly payments, could be unintentionally omitted, but the reformation sought is insertion of language calling for the payment of interest on all unpaid balances with deduction from the monthly payments, no reference being made to the two $50 and the single $75 instalments. It is difficult to believe that an interest provision so complicated as would be necessary to evidence a mutual understanding for interest on a part but not all could be overlooked. For the separate instrument the language used seems indicative of a transaction involving no interest. Had interest been contemplated the words "with interest as stated in said bond" would have been sufficient to incorporate both instalment and interest recitals, but the written document says only "in amounts." The document sought to be reformed was prepared, referred to in a companion document and read to the principal who signed it. To believe that provision for interest was omitted by mistake requires acceptance of the theory that it was overlooked on three occasions. On the question, to quote what Chief Justice Peters said in *Linscott* v. *Linscott et al.*, 83 Me., 384, 22 A., 253, while the agent swore strongly, there is lacking in his testimony "that manner of statement which impresses belief."

Startingly different transactions are presented by the bond as it stands and as it is sought to be reformed. It calls for a price of $3,400, all but $175 of which is payable in instalments

of $30 a month. Computing interest payable on the $30 payments only, the defendants would have owed more than $970 as unpaid principal at the expiration of nine years, whereas without interest they would then have paid the purchase price in full. Counsel for the plaintiff cite us to no case, nor have we been able to discover one, where a written instrument has been reformed to impose upon one party a trade so widely at variance from that subscribed. As stated in *Andrews* v. *Andrews,* 81 Me., 337, 17 A., 166, when the parties have variant understandings of a trade, relief should:

> "take on the form of cancellation, rather than reformation."

Here an earlier case, *Young et al.* v. *McGowan,* 62 Me., 56, is cited, wherein the same thought is expressed in the words:

> "A mistake on one side may be a ground for rescinding a contract, or for refusing its specific performance; but it cannot be a ground for altering its terms."

Perhaps the closing words of the opinion in the *Young* case are also pertinent:

> "It is no part of the duty of a court of equity to relieve against . . . negligence . . . , or to correct . . . blunders . . . . "

Assuming the true fact to be that the plaintiff's agents contemplated interest, notwithstanding the strong probability that the decree evidences acceptance of the factual contentions of the defendants by the Justice who heard the cause and had the opportunity to observe the witnesses as their testimony was given, the record would not justify a decree ordering the bond reformed in accordance with the prayer stated in the bill.

Appeal denied.
Decree below affirmed.

FLAVIE LEBEL *vs.* ALEXINA CYR.

Aroostook. Opinion, October 18, 1943.

Reference and Referees. Jurisdiction. Judicial Discretion. Default.

1. References of causes may be by rule of court or otherwise. When not by rule of court, either party to the submission may revoke the reference.
2. Whenever by express agreement or necessary implication the cause is to be retained on the docket until the arbitration is perfected by an award, there will be no discontinuance of the pending cause by reason of mere submission to arbitration.
3. Upon hearing and for good cause the Court may rescind a rule of reference and dispose of the cause in some other way.
4. Where the defendant files a motion to permit the filing of pleadings and specifications and there is a hearing on such motion together with a hearing on plaintiff's motion for default, the allowance of the motion for default denies in fact the defendant's motion, although there is no direct denial of the defendant's motion.
5. Where the rule of reference is sought to be withdrawn, the Court should act in the exercise of proper discretion and within the bounds of justice.
6. To the decision of the Court recalling such reference there is a right of exception only when there is an abuse of discretion and the burden to prove such rests upon him who alleges it.

Judicial discretion does not mean the arbitrary will and pleasure of the judge who exercises it. It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice.

ON EXCEPTIONS.

A judgment of default had been entered in an action by plaintiff against the defendant. The writ, dated August 14, 1941 was entered in the Superior Court in Aroostook County at the September term, 1941. Terms of court in that County

are held in February, April, September and November. At the April term, 1942, by agreement the action was referred to a justice of the Superior Court. At the November term, the reference was taken off by agreement and the defendant was ordered by the Court to file pleadings and specifications of defense on or before December 1, 1942, and the case was again referred to the same justice. At the February term, 1943, the plaintiff filed a motion for default because the pleadings had not been filed. The presiding justice granted the motion. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

Alice M. Parker, for the plaintiff.

Arthur J. Nadeau,

John B. Pelletier, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. This is a real action brought to this Court on exceptions by the defendant to an ordered judgment of default.

These are the material, undisputed facts: The writ, dated August 14, 1941, was entered in the Superior Court in Aroostook County at the September term 1941. That Court has four terms yearly in that county—in February, April, September, and November. At the April term 1942 by agreement the action was referred under rule of court to a Justice of the Superior Court "with right of exceptions in matters of law; defendant to have right to file disclaimer." No disclaimer was filed. At the November term 1942 the reference was taken off by agreement, and the defendant was ordered by the Court to file pleadings and specifications of defense on or before December 1, 1942. Also at that November term the case was referred to the same Justice with like right of exceptions. Rule to the referee did not issue. At the February term 1943 the

plaintiff filed a motion for default because the pleadings and specifications had not been filed, and the defendant moved to be permitted to file the same then on the ground that she had not been able to obtain the services of a surveyor which she considered necessary for compliance with the order for previous filing. These two motions were heard together by the presiding Justice, who granted the motion for default. The record is silent as to what if any action was taken on the defendant's motion.

Under the exceptions, as admitted in defendant's brief, two questions only are here presented for decision: namely, (1) "While the said case was under references, did the said Superior Court have jurisdiction to order a judgment by default in favor of the plaintiff," and (2) "Did the Court exercise sound judicial discretion, so as to work out substantial equity and justice."

The First Question

We are concerned with the second reference at the November term 1942. This was by rule of court. References may be by rule of court or otherwise. When not by rule of court, either party to the submission may revoke the reference, but this does not hold where the submission is by rule of court. *Gregory* v. *Pike*, 94 Me., 27, 32, 46 A. 793; *Clark* v. *Clark*, 111 Me., 416, 417, 418, 89 A. 454. Where there is a selection by the parties of "another and different tribunal from that in which a case is pending to settle their controversies, as when they enter into a reference of a pending suit at common law or into a statutory submission, the cause thus referred is thereby discontinued." *Hearne* v. *Brown*, 67 Me., 156, 158. But there is no such discontinuance where there is to be a "judgment on the report or a cognovit is to follow." *Ex parte Wright*, 6 Cow., (N. Y.) 399; *Hearne* v. *Brown*, supra, on page 158. Whenever "by express agreement *or necessary implication* the cause is

to be retained on the docket until the arbitration is perfected by an award" (italics ours) there will be no discontinuance of the pending cause by reason of mere submission to arbitration. *Hearne* v. *Brown,* supra, on page 158.

In *Clark* v. *Clark,* supra, it is stated on page 418:

> "The submission of a cause by rule of court necessarily means that the cause is entered upon the docket of that court, is within the jurisdiction of that court, and under the control and direction of that court so far, at least, as procedure is concerned. The right of the court, therefore, acting in the exercise of proper discretion, and within the bounds of justice, would seem to fully warrant the recall of the rule of reference under circumstances like the case at bar."

In *Clark* v. *Clark,* supra, procedure was concerned. So it is in the instant case. At the February term 1943 the Court procedurally and with authority recalled the case from reference. In *Dexter v. Young,* 40 N. H., 130, cited on page 418 of *Clark* v. *Clark,* supra, page 455 in 89 A., it was held that upon a hearing and for good cause the Court could rescind a rule of reference and dispose of the cause in some other way.

Our answer to question one is that the reference did not effect a loss of jurisdiction and deprive the Court of the right of revoking the reference and ordering the judgment of default.

But the defendant contends that the Court rendered no decision on her motion (heard with the motion for default) to permit the filing of her pleadings and specifications at that term of court. However, the effect of the granting of the plaintiff's motion for default was to deny in fact the defendant's motion.

The Second Question

Whether or not the reference should be revoked by the Court and the defendant defaulted under the circumstances

of the case were within the discretion of the Court. Rule of Court VII provides:

> "Either party may obtain a rule on the other to plead, reply, rejoin, etc., within a given time to be prescribed by the court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall enlarge the rule."

It was the duty of the Court to act in the exercise of proper discretion and within the bounds of justice. *Clark* v. *Clark,* supra, on page 418. Decisions made in the exercise of proper discretion and within the bounds of justice are not exceptionable. The right of exception arises only when there is an abuse of discretion and the burden to prove such rests upon him who alleges it. *Day* v. *Booth,* 122 Me., 91, 92, 118 A. 899; *Foss* v. *Richards,* 126 Me., 419, 422, 139 A. 313.

Judicial discretion "does not mean the arbitrary will and pleasure of the Judge who exercises it. It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion." *Charlesworth* v. *American Express Company,* 117 Me., 219, 221, 103 A. 358, 359; *Hill* v. *Finnemore,* 132 Me., 459, 473, 172 A. 826; *Bourisk* v. *Mohican Co.,* 133 Me., 207, 210, 175 A. 345.

Then has the defendant in this case proved clear abuse of judicial discretion? We think not. As stated, the two motions were heard together, and the Justice must have concluded that "good cause" was not "shown" for enlarging Rule VII, *supra.* The record does not contain the evidence then presented, so

we cannot review the facts. However, the case had been pending in court a long time and the Court might have concluded that the defendant had unreasonably delayed the proceedings. See *Clark* v. *Clark*, supra, on page 418. This record lacks proof of clear abuse of discretion.

Exceptions overruled.

JOSEPH A. ROY *vs.* EUGENE BOLDUC.

Kennebec. Opinion, October 20, 1943.

Contracts. Restrictions in Trade Agreements.

An agreement by an employee as a part of his contract of employment that he will not engage in competition with his employer after the termination of the employment may be enforced in equity if it is reasonable under the circumstances.

To fall within this rule, however, the agreement must impose no undue hardship upon the employee and be no wider in its scope than is reasonably necessary for the protection of the business of the employer.

While an employer under a proper restrictive agreement can prevent a former employee from using his trade or business secrets and other confidential knowledge gained in the course of the employment, and from enticing away old customers, he has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood, and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment. Public policy prohibits such undue restrictions upon an employee's liberty of action in his trade or calling.

On the record in this case the complaining employer fails to sustain his allegations that a reasonable protection of his real estate business re-

quires the enforcement of the restrictive agreement he obtained from his salesman.

Furthermore, to restrain the employee from acting as a real estate agent on his own account, for the time and in the extensive territory included in his agreement, would unnecessarily interfere with the rightful exercise of his skill and knowledge in gaining a livelihood in what is now his calling or trade and this public policy prohibits.

ON APPEAL.

This was a proceeding in equity to restrain a former salesman from competing with the real estate agent by whom he had been employed. The plaintiff had established and was carrying on a substantial and lucrative real estate business in Waterville. His office methods were common-place. In December, 1939, he employed the defendant as a real estate salesman. One of the provisions of the contract entered into was that for a period of five years the defendant should not engage in any business pertaining to the real estate brokerage business in Waterville and certain other named localities subsequent to the termination of his employment by the plaintiff. In June, 1940, due to a controversy between plaintiff and defendant, the defendant was discharged. He then opened a real estate office in Waterville on his own account and proceeded to engage in the real estate business. In the court below a decree dismissing plaintiff's bill was signed and entered. Plaintiff appealed. Appeal dismissed. The case fully appears in the opinion.

James L. Boyle,

Edward M. Sweeney, for the plaintiff.

F. Harold Dubord,

Jerome G. Daviau, for the defendant.

SITTING: STURGIS, C. J., THAXTER, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. This is a proceeding in equity to restrain a former salesman from competing with the real estate agent by whom he had been employed. Answer having been made and replication filed, on hearing, a decree dismissing the bill with costs was signed and entered. The case comes forward on appeal.

The printed case shows that the plaintiff Joseph A. Roy had for several years been a real estate agent in Waterville, Maine, and has established a substantial and lucrative business. The methods he has used in attaining this success, however, have been neither original nor unique. He is a heavy advertiser but his copy follows forms well known in the business and the mediums he uses are not unusual. His office methods and systems are as common-place. He operates in a field where there are numerous competing real estate agencies and nearly all of his customers are transient and few, if any, are repeaters.

On December 22, 1939, Joseph A. Roy employed Eugene Bolduc as a real estate salesman agreeing in the written contract the parties executed to pay him fifty per cent of all commissions, fees and charges accruing from sales which he directly made or negotiated, with the right to sell any property listed or being handled through the Waterville office of the employer. The contract was subject to termination on fifteen days' written notice by either party and contained the following provision:

> "The party of the second part further agrees that upon the termination of this agreement, he shall not act as a real estate agent, broker, salesman, or conduct any business pertaining to, or incidental to the real estate brokerage business for a period of five (5) years from the date of the termination of this agreement in the following towns and cities and their immediate vicinities: Waterville, Fairfield, Skowhegan, Augusta, Pittsfield, Burnham, Benton, Winslow, Hinckley, and Oakland."

While the employer regularly maintained an office in Waterville and for a time did at Augusta and Skowhegan it is not made to appear that he obtained any business of account from other towns and cities and their immediate vicinities included in this agreement. And it was in Waterville only that the salesman could operate.

For six months the parties acted under their contract and the arrangement proved generally satisfactory. The salesman had the use of a desk in common with other employees in the office in Waterville, had access to files and lists of property being handled there, and earned some commissions. While he was assisted in some instances in closing sales and experience undoubtedly increased his knowledge of the real estate business it does not appear that he received any advice or instructions from his employer beyond those which might be given by any real estate agent exercising reasonable supervision over his salesmen or that he received confidential information or learned trade secrets which he could use to the disadvantage of his employer.

On June 12, 1940, a controversy arose as to whether the salesman was entitled to share in the commission on the sale of land and buildings in Waterville and, not receiving it, he refused to work until it was paid and threatened suit against his employer. Ten days later he was discharged and notice given to the licensing authorities of the termination of his employment. He then opened a real estate office in Waterville on his own account and is still carrying on that business. However, he has not used his employer's lists of customers, solicited their patronage, or acted for them, but, following methods in general use among many if not all real estate agents, is building up a business of his own and, if successful, it will be because of his own efforts, industry and perhaps personality. As one more competitor among several he is, of course, using the knowledge and experience he gained while employed.

An agreement by an employee as a part of his contract of

employment that he will not engage in competition with his employer after the termination of the employment may be enforced in equity if it is reasonable under the circumstances. To fall within this rule, however, the agreement must impose no undue hardship upon the employee and be no wider in its scope than is reasonably necessary for the protection of the business of the employer. Among the many authorities supporting this rule are: *Samuel Stores, Inc.* v. *Abrams,* 94 Conn., 248, 108 A., 541, 9 A. L. R., 1450; *May* v. *Young,* 125 Conn., 1, 2 A. (2d), 385, 119 A. L. R., 1445; *Briggs* v. *Mason,* 217 Ky., 269, 289 S. W., 295, 52 A. L. R., 1344; *Sherman* v. *Pfefferkon,* 241 Mass., 468, 135 N. E., 568; *Club Aluminum Co.* v. *Young,* 263 Mass., 223, 160 N. E., 804; *Walker Coal & Ice Co.* v. *Westerman,* 263 Mass., 235, 160 N. E., 801; *Gordon Supply Co.* v. *Galuska,* 113 N. J. Eq., 353, 166 A., 700; *Automobile Club of Southern N. J.* v. *Zubrin,* 127 N. J. Eq., 202, 12 A. (2d), 369; *Clark Paper & Mfg. Co.* v. *Stenacher,* 236 N. Y., 312, 140 N. E., 708, 29 A. L. R., 1325; *Unity Coat & Apron Co.* v. *Battist,* 264 N. Y. S., 801; *Milwaukee Linen Supply Co.* v. *Ring,* 210 Wis., 467, 246 N. W., 567; 36 *Am. Jur.,* 555; 17 C. J. S., 636; *Restatement of Contracts,* Vol. II, Sec. 516.

It is accordingly held that while an employer, under a proper restrictive agreement, can prevent a former employee from using his trade or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers, he has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment. Public policy prohibits such undue restrictions upon an employee's liberty of action in his trade or calling. *Samuel Stores, Inc.* v. *Abrams,* supra; *Club Aluminum Co.* v. *Young,* supra; *Automobile Club of Southern N. J.* v. *Zubrin,* supra; *Clark Paper*

& Mfg. Co. v. *Stenacher,* supra; *Nordenfeldt* v. *Maxim Nordenfeldt Guns & Ammunition Co., Ltd.* (1894) A. C. 535; *Herbert Morris, Ltd.* v. *Saxelby* (1916) 1 A. C., 688; *Restatement of Contracts,* Vol. II, Section 516f.

On this record the complaining employer fails to sustain his allegations that a reasonable protection of his real estate business requires the enforcement of the restrictive agreement he obtained from his salesman. He had no trade secrets and imparted no confidential information which have or can be used to his disadvantage and there has been no interference with the customers on his lists. To restrain his employee from acting as a real estate agent on his own account, for the time and in the extensive territory included in his agreement, would unnecessarily interfere with the rightful exercise of his skill and knowledge in gaining a livelihood in what is now his calling or trade. Tested by the rules which have been stated the restriction upon the employee's liberty of action, which is written into the contract of employment in this case, is against public policy and equity will not enforce it.

Appeal dismissed.
Decree below affirmed.

VIOLA M. WAITT, APPELLANT
FROM DECREE OF JUDGE OF PROBATE.

Kennebec. Opinion, October 28, 1943.

Guardians. Probate Courts. Jurisdiction.

A petition for removal of a guardian must, under our established procedure, be brought by a party in interest. A guardian ad litem, appointed by a probate court in Massachusetts for a particular proceeding there does not qualify as a party in interest in the present litigation.

Probate Courts are creatures of statute and not of common law and have a special and limited jurisdiction. They have no jurisdiction, no powers, no modes of procedure or practice except such as are derived from the provisions of the statutes. The record of their proceedings must show their jurisdiction. The preliminary requisites and the course of proceedings prescribed by law must be complied with or jurisdiction does not attach.

Chapter 75, Section 48, R. S., 1930, authorizes the adoption of rules of practice for orderly procedure and of probate forms, which thereby become official and which are declared to be in force in all courts of probate.

A probate judge may act upon the petition of those interested or upon personal knowledge derived from the official conduct of the guardian as disclosed in the records of the court.

In the instant case, the action of the Judge of Probate was not taken upon his own knowledge obtained from the records of the court but upon the allegations contained in the petition of one who claimed to be an interested party, but was not a party in interest.

Although the Probate Court decree is void, yet, since, except for the appellate proceedings, it would be regarded as binding in that Court and enforced, it was deemed more logical to sustain the proceedings which call the lack of jurisdiction to the attention of the Court than to dismiss them.

ON EXCEPTIONS.

The appellant, Viola M. Waitt was appointed guardian of her two minor children by the Kennebec Probate Court. Upon the petition of one, E. Max Gladstone, of Brookline, Massa-

chusetts, setting forth that he was interested in the estate of the minors by virtue of an appointment as their guardian ad litem in a proceeding in the Probate Court of Plymouth County, Massachusetts, the appellant was removed as guardian and Walter M. Sanborn of Augusta was appointed in her stead. Appeal from the new appointment was denied by the Supreme Court of Probate under a decree which affirmed the action of the Judge of Probate. The Appellant filed exceptions. Exceptions sustained. Decree of Probate Court declared void for want of jurisdiction. The case fully appears in the opinion.

George W. Abele, Boston,

Brooks Whitehouse, for appellant.

Walter M. Sanborn, for appellee.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. Viola M. Waitt was appointed guardian of her two minor children by the Kennebec Probate Court on January 2, 1941. On December 28, 1942, she was removed as guardian, and Walter M. Sanborn of Augusta was appointed in her stead. The latter action was taken on petition of one E. Max Gladstone of Brookline, Massachusetts, setting forth that he was interested in the estate of the minors by virtue of an appointment as their guardian ad litem in a proceeding in the Probate Court of Plymouth County, Massachusetts. Appeal from the new appointment was denied by the Supreme Court of Probate under decree which affirmed the action of the Judge of Probate. The case comes forward on exceptions.

There being no statutory right of appeal from the removal of a guardian (R. S., c. 75, §31), the appeal proceedings in the Supreme Court of Probate were necessarily restricted to the new appointment. The exceptions, in substance, assert:

(1) That the Court can act only on the petition of an interested party; that a guardian ad litem appointed for a special purpose in proceedings in another State is not such an interested party.

(2) That the petition sought only the removal of the appointed guardian, contained no prayer for the appointment of a new guardian and the Court had no authority to make such new appointment without petition, due notice and hearing thereon.

(3) That there was abuse of discretion in the appointment as the appointee was counsel in the proceedings.

The only record before this Court is the petition, the decree of the Probate Court, the appeal therefrom, the decree of the Supreme Court of Probate, and the exceptions taken thereto.

Counsel for the petitioner improperly included in his brief a statement of alleged facts, unsupported of record, and counsel for the appellant thereupon in a reply brief gave their version of the factual background. In judicial procedure such unwarranted attempts to secure consideration of matters outside the record can receive no recognition or consideration and will not be countenanced.

Of primary consideration is the exception which raises the fundamental question that the Probate Judge had no jurisdiction or authority to act upon the petition appearing in the record, since the proceedings were not initiated by a party in interest.

Probate Courts are creatures of statute and not of the common law, and have a special and limited jurisdiction. They have no jurisdiction, no powers, no modes of procedure or practice, except such as are derived from the provisions of the statutes. The record of their proceedings must show their jurisdiction. The preliminary requisites, and the course of proceedings prescribed by law, must be complied with or jurisdiction does not attach. *Moody* v. *Moody,* 11 Me., 247;

Fairfield v. *Gullifer*, 49 Me., 360, 77 Am. Dec., 265; *Coolidge* v. *Allen*, 82 Me., 23, 19 A., 89; *Tracy* v. *Roberts*, 88 Me., 310, 34 A., 68, 51 Am. St. Rep., 394.

Jurisdiction is granted to the Probate Court with relation to the guardianship of minors and in all matters affecting their property and welfare. The statutes regarding the power of appointment and removal are couched in general terms and read as follows:

> "The judge of probate may appoint guardians to minors resident in his county." R. S., c. 80, §1.
>
> "He may grant leave to adopt children, change the name of persons, appoint guardians for minors and others according to law, and has jurisdiction as to persons under guardianship, and as to whatever else is conferred on him by law." R. S., c. 75, §9.
>
> "The judge may dismiss any guardian, when it appears necessary, or at his own request, and if the case requires it, may appoint another in his place; but previous to such removal, except at his own request, personal notice shall be given to the guardian, . . . to appear and show cause to the contrary;" R. S., c. 80, §23.

Procedural requirements are not here specified. In these particular sections is no substantive provision that petition must be presented by some person having a definite legal right to initiate the proceeding. As to guardians for adults, including persons of unsound mind, spendthrifts and convicts, there is express provision that appointment is to be made on the written application of their friends, relatives or creditors, or of the municipal officers or overseers of the poor of the town where they reside. R. S., c. 80, §4.

R. S., c. 75, §48, however, authorizes the adoption of rules of practice for orderly procedure, and of probate forms which thereby become official and which are declared to "be in force

in all courts of probate." One of the rules so adopted provides that "approved blanks shall be furnished by the Registrar, and must be used in all proceedings to which they are applicable." The form provided for removal of executor, administrator, guardian or trustee is couched in the following language:

> "Respectfully represents ..... of ..... that he is interested in the estate of ....."

The question for determination is whether this established procedure must be followed in order to give the Probate Court jurisdiction, and if so, whether the present petitioner, who alleged that he was interested as "guardian ad litem of said minors, by virtue of a decree of the Probate Court for Plymouth County in said Commonwealth," comes within the definition of a party in interest.

It is argued that minor children are entitled to special protection and that the jurisdiction of the Probate Court is intended to be broad and comprehensive; that the authority originally granted to a Court of chancery in England now resides in our Probate Courts; that if it becomes cognizant of the necessary facts, the Court should protect the rights of minors; that if it has jurisdiction of the subject matter and parties, it may pass upon and adjudicate the rights of minors and the decree will be binding. Such doctrinal statement is found in substance in 27 Am. Jur., Infants, §101, and it is claimed that this principle has been adopted by our Court and is enunciated in *Hovey* v. *Harmon*, 49 Me., 269.

It is contended, therefore, that any person, whether interested or not, may inform the Court by petition of facts and circumstances which warrant its intervention.

It is true that our Court has well said in *Lunt* v. *Aubens*, 39 Me., 392, that "The paramount object of the law, is the protection of the minor." It proceeds, however, as follows:

> "To accomplish that object, it authorizes the interposition in his behalf of such persons as have interests in common with him and whose relations to him are such as to raise the presumption of a feeling of natural affection for him and a desire to promote his welfare."

We are not in disagreement with the statement of the Court in *Hovey* v. *Harmon,* supra, which reads:

> "So he may act in the matter upon the petition of those interested, or upon his own knowledge derived from the official conduct of the guardian as disclosed in the records of his Court."

In the instant case, however, the action of the Judge of Probate was not taken upon his own knowledge obtained from the records of his Court, but upon the petition of a person who claimed to be an interested party. Further, it is to be noted that the present issue was not actually before the Court in the Hovey case. The Court had dismissed the guardian at his own request and the proceedings related to the validity of a deed executed by the former ward after the termination of the guardianship. That the Court did not intend to broaden by judicial construction the established rules of practice and procedure, is significantly shown by the decision in *Fairfield* v. *Gullifer,* 49 Me., 360, reported in the same volume as *Hovey* v. *Harmon,* 49 Me., 269, the membership of the Court, with one exception, being the same.

The petition before the Court recites in general terms that the guardian had failed to conserve the estate of the minors and had caused exorbitant expense by instituting litigation in their behalf. It does not appear that the guardian had received any actual assets belonging to the wards, nor is it alleged in what manner she had obligated their estate. The Probate judge is given authority to safeguard the pecuniary rights of minors by citing the guardian to settle an account. R. S., c. 80, §24.

This procedure is designed to protect the interests of the minors, requires no formal intervention, and is expressly provided for by statute.

We hold that a petition for removal of a guardian must, under our established procedure, be brought by a party in interest. That a guardian ad litem, appointed by a Probate Court in Massachusetts for a particular proceeding there pending, does not qualify as a party in interest in the present litigation, is well established. He was appointed for a special purpose and his powers, rights and duties were restricted thereto. *King* v. *Emmons*, 283 Mich. 116, 277 N. W. 851, 115 A.L.R. 564; *Crawford* v. *Amusement Syndicate Co.*, Mo. Sup., 37 S. W. 2d, 581; *Richter* v. *Leiby's Estates*, 107 Wis. 404, 83 N. W. 694. He has no right as guardian ad litem to initiate legal proceedings in another State. *Morgan* v. *Potter*, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670.

Although the remaining exceptions appear to be without merit, they are unnecessary of decision, as the determination that the Probate Court was without jurisdiction is conclusive.

The nature of the decree to be rendered by this Court has been diversely treated. In *White* v. *Riggs*, 27 Me. 114, the Court said:

> "As the supposed decree was void, because the probate court had no jurisdiction, the appeal must be dismissed."

Our Court, however, in an earlier case, *Moody* v. *Moody*, 11 Me. 247, said:

> "In point of form, then, the decree is a legal, valid and subsisting one. If it had the force and effect of a judgment at common law, it could not be impeached while unreversed, except upon the ground of fraud, As, however, the proceedings of a Court of Probate are not according to the course of the common law, and therefore not ex-

> aminable upon a writ of error, it is doubtless competent for a party, attempted to be charged by a decree of that Court to repel its operation upon him by showing in the proceedings a substantial departure from the requirements of law."

In *Veazie Bank* v. *Young*, 53 Me., 555, the Court posed the question: "How any party can be legally aggrieved by an act which is simply void, and of no effect, is not readily apparent." Decision in that case went, however, upon the point that the appellant was not shown to be a party in interest and therefore not entitled to be heard.

Although the Probate Court decree is void, yet "In point of form such decree is a valid and subsisting one" and except for the appellate proceedings would be regarded and enforced by that Court as binding upon the removed guardian and the newly appointed one. It seems more logical to sustain the proceedings which call the lack of jurisdiction to the attention of the Court than to dismiss them because the Court agreed with the contention thus raised. *Sturges* v. *Peck*, 12 Conn. 139; also *English* v. *Smith*, 13 Conn. 221, in which the Court adopted the reasoning:

> "It may frequently become indispensable to reverse, alter or modify the previous proceedings, in order to make them consistent with the decree here to be pronounced."

The entry, therefore, will be

Exception sustained.
Decree of Probate Court declared void for want of jurisdiction.

MANUFACTURERS NATIONAL BANK,
TRUSTEE UNDER THE WILL OF HERBERT F. SHAW
and
CARLTON E. TURNER, HELEN C. CUSHMAN and
MARJORIE F. MOORE, TRUSTEES OF THE ESTATE
GIVEN IN TRUST UNDER THE WILL OF
HERBERT F. SHAW.

vs.

ADELBERT S. WOODWARD.

Androscoggin. Opinion, November 2, 1943.

Wills. Trusts. Doctrine of Cy Pres.

The clause of the will in question in the instant case is clear and restricts the use of the income to repairs on the building and for the purchase of books.

To justify the application of *cy pres* it must appear that the original purpose of the testator as set forth in his will cannot be carried out.

In the instant case, the doctrine of *cy pres* could not be applied because it did not appear either in the allegations or in the proof that there were no funds for operation of the library and that none could be procured, and that, therefore, the purpose of the testator would fail.

ON APPEAL.

Suit was brought praying that the Court construe and interpret the will of Herbert F. Shaw; and that in particular, it determine whether the trustees were "entitled to use the income from such fund for the necessary expenses involved in equiping and operating the proposed library, or are confined to using such income solely for the repairing of said building and the purchase of books." The will of Herbert F. Shaw had provided that the income from the fund "be used in keeping the buildings in repair and purchasing suitable books for the

Library." The sitting justice sustained the bill. The defendant appealed. Appeal sustained. Case remanded to the sitting justice for a decree dismissing the bill without costs and without prejudice to the right of the plaintiffs to bring another bill if they can show proper grounds therefor whether under the rule of *cy pres* or in accordance with the doctrine approved in *Porter* v. *Porter*, 138 Me., 71, 20 A. (2d), 465. The case fully appears in the opinion.

Frank T. Powers, for the plaintiffs.

George C. & Donald W. Webber, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MURCHIE, CHAPMAN, JJ.

THAXTER, J. Herbert F. Shaw, late of Mount Vernon, in the County of Kennebec, sought by his will to make provision for a public library in the town. His intent is expressed in the following language:

> "FIRST: I give and bequeath to the Town of Mount Vernon, Maine, my house and lot, in Mount Vernon Village, for use as a public library, and whatever remains after other sums hereinafter to be named have been disposed of shall be kept as a permanent fund, the income of which shall be used in keeping the buildings in repair and purchasing suitable books for the library. With the house I wish the Town to have everything which the buildings contain except a few articles which are kept for storage, and which belong to Annie W. Fellows. I would like for my safe to be always kept in the house. The combination of the lock is set at 77-88-28-97."

The Manufacturers National Bank, one of the plaintiffs herein, was appointed executor of the will and of the fund set up by the first clause thereof. The Town of Mount Vernon by equiv-

ocal action at various town meetings attempted to create what this court, when this will was previously considered, called a "negotiated intestacy." *Manufacturers National Bank* v. *Woodward,* 138 Me. 70, 21 A (2d) 705. The opinion in the previous case held that the town's action was in effect a declination to act as trustee under the will, and attention was called to the well established doctrine that no trust will be allowed to fail for want of a trustee. We also held that it was the testator's purpose to make the town trustee of the land and the house thereon and also of such contents of the house as belonged to the testator, and to make the bank the trustee of the residue of the estate, both of which trusts were designed "to serve the common purpose of providing a public library in the town." The case was remanded for a decree, under the terms of which Carleton E. Turner, Helen C. Cushman and Marjorie F. Moore were appointed trustees in place of the Town of Mount Vernon. They as such trustees together with the Manufacturers National Bank are plaintiffs in the present bill.

The bill alleges that the trustees have remodeled the homestead and that it is now suitable for the purposes of a library, that the bank as trustee has in its possession approximately $29,000 as principal of the fund with approximately $10,000 to be added thereto in two separate sums on the death of two life tenants. The prayer is that the court will construe and interpret the will, and that it will in particular determine whether the trustees "are entitled to use the income from such fund for the necessary expenses involved in equipping and operating the proposed library, or are confined to using such income solely for the repairing of said building and the purchase of books."

The sitting justice sustained the bill and entered a decree to the following effect:

> "That the trust provisions under consideration are interpreted as sufficiently broad to permit the trustees to

use the net income of the trust fund for all necessary purposes in the maintenance and operation of the public library, and thus effectuate the beneficent and charitable purpose of the testator."

From this decree the defendant has appealed.

From the findings of the sitting justice it is apparent that he regarded this as a proper case in which to apply the doctrine of *cy pres*. To justify the application of the doctrine of *cy pres* it must appear that the original purpose of the testator as set forth in his will cannot be carried out. *Doyle* v. *Whalen,* 87 Me., 414, 32 A. 1022, 31 L. R. A. 118; *Allen* v. *Nasson Institute,* 107 Me., 120, 77 A. 638; *Snow and Clifford* v. *The President and Trustees of Bowdoin College, et als,* 133 Me., 195, 175 A., 268. The bill in the instant case does not allege that the purpose of the testator has failed and the record contains no evidence to show that it has. In fact all that the sitting justice has found is that the trust is "likely to fail." The bill seeks an interpretation of the first clause of the will which to us seems perfectly clear. The income of the fund is to be used "in keeping the buildings in repair and purchasing suitable books for the library." To read into this language an authorization to the trustee to use the income of the fund for general maintenance would be to make a will, not to interpret one. This the court cannot do. *Allen* v. *Nasson Institute,* supra, 123. In the absence of allegation and proof that there are no funds for the operation of the library and that none can be procured, and that accordingly the gift of the testator must fail, there is no basis on which the court can invoke the rule of *cy pres*.

The appeal in this case must be sustained and the case remanded to the sitting justice for a decree dismissing the bill without costs. The plaintiffs should not, however, be precluded from bringing another bill, if they can show proper grounds therefor whether under the rule of *cy pres* or in accordance with the doctrine approved in *Porter v. Porter,* 138

Me., 1, 20 A. (2d), 465, or under any other principle justifying intervention by equity. To this end the bill should be dismissed without prejudice.

So Ordered.

GEORGE A. ROBITAILLE'S CASE.

York. Opinion, November 3, 1943.

Workmen's Compensation Act.

Before the Commission, the burden of proof was upon the claimant to establish her contention upon the issue raised by a fair preponderance of the evidence.

The Commission, under the Workmen's Compensation Act, is the trier of facts and its findings thereof, whether for or against the claimant, are final, but in arriving at its conclusions it must be guided by legal principles. The authority of the Law Court is limited to questions of law. If the Commission commits an error of law, it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record.

In the instant case, there being competent evidence in favor of the claimant and of the defendant, respectively, whether the claimant had sustained the burden of proof was a question of fact for the determination of the Commission and its finding cannot be disturbed.

ON APPEAL.

The original petition was brought by the widow of the deceased employee, whose death it was alleged was the result of injuries received in an accident arising out of and in the course of his employment. The deceased, George A. Robitaille, was an auxilliary member of the fire department of the town of San-

ford. While in the performance of his duties at a fire he received burns of first and second degree about his head, hands and arms. Sixteen days later he died suddenly from what an autopsy disclosed to be coronary thrombosis. The issue before the Commission was whether the physical exertion or mental stress experienced by the deceased at the time of the fire, or the burns themselves, directly caused the coronary thrombosis or so aggravated or accelerated a previously existing condition as to cause the coronary thrombosis at the time when it occurred. At the hearing, evidence in favor of each of the litigants was presented. The Commission decided against the claimant. Its decision was embodied in a pro forma decree of a Superior Court Justic. The claimant appealed. Appeal dismissed. The case fully appears in the opinion.

Titcomb & Siddall, for the claimant.

Robinson & Richardson, for the employer.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. This cause is an appeal from the decree of a Justice of the Superior Court confirming a finding of the Industrial Accident Commission. The original petition for compensation was brought by the widow of the deceased employee whose death it was alleged was the result of injuries received in an accident arising out of and in the course of his employment.

The deceased was one George A. Robitaille, an auxiliary member of the fire department of the town of Sanford. While in the performance of his duty at a fire he received burns of first and second degree about his head, hands and arms. Sixteen days later Mr. Robitaille died suddenly from what an autopsy disclosed to be a coronary thrombosis. The issue raised before the Commissioner was solely upon whether either the physical exertion or mental stress which Mr. Robitaille ex-

perienced at the time of the fire, or the burns themselves, directly caused the coronary thrombosis or so aggravated or accelerated a previously existing diseased coronary condition as to bring about the thrombosis at the time when it occurred. The establishment of the affirmative of this issue would entitle the complainant to a decision in her favor. Otherwise the defendant employer was entitled to the decision.

At the hearing before the Commission testimony was presented in behalf of the claimant to the effect that the deceased was thirty-seven years of age and, previous to the time when he received the injuries, was regularly employed in the Sanford Mills and as an auxiliary fireman by the Town of Sanford; that he had worked daily at his regular employment which required somewhat strenuous physical exertion; that during the three years next preceding the accident he had made no complaint of being sick and had visited a doctor but once during that time, and that for a minor ailment. This was evidence of good health. The Commission would have been justified in finding that his physical appearance previous to the accident was such as to indicate the continuation of his apparent good health. The Commission also had a right to take into consideration the fact, universally known, that, if a person is afflicted with a serious ailment, personal injuries may aggravate such ailment and in some cases sufficiently so as to hasten death. So it may be said that there was evidence of probative force in favor of the claimant.

Likewise there was evidence to support the position of the employer that death at the time when it occurred was not the result of the accident. There was evidence that, while the burns were painful, he was not overcome at the time when they were received; that of his own accord he walked into the doctor's office for treatment and that he steadily improved, so far as his injuries were apparent, up to the time of his death, which occurred with the suddenness usual to the disease with which it was found that he was afflicted, and that on the day

of his death, sixteen days after the accident, he appeared, except for his burns, to be in his usual health.

An autopsy disclosed that the coronary arteries had deteriorated to such an extent that there was a shrinkage in the canal of the artery where the thrombus formed of seventy-five to eighty percent. Medical witnesses gave it as their opinion that the deterioration of the arteries had extended over a period of months or years and that the process of gradual deterioration had finally resulted in a rupture of tissue, and that the thrombus, under microscopic examination, appeared to be of recent origin. Medical opinion was presented that the rupture of the tissue had occurred only a few minutes previous to death and that it was not to be associated with the burns.

Thus the Commission had before it evidence in favor of the contention of each of the respective litigants and upon that evidence rendered its decision, a finding of fact against the claimant. The decision was duly embodied in a *pro forma* decree of a Superior Court Justice and an appeal therefrom taken.

Before the Commission the burden of proof was upon the claimant to establish her contention upon the issued raised, by a fair preponderance of the evidence. *Westman's Case*, 118 Me., 133, 138, 106 A., 532. She contends that she successfully sustained this burden and asks that this Court review the case upon the merits of the evidence presented to the Commission and set aside the decision of that tribunal by reason of its failure to decide in her favor. In support of the authority of the Court to take such action her counsel cites *Orff's Case*, 122 Me., 114, 119 A., 67, to the effect, as counsel claims, that while in a case in which the decision is in favor of the claimant the Court will not interfere therewith if there be any competent evidence in support of the decision, in a case in which the decision is against the claimant the Court will review the evidence and sustain or set aside the decision in accordance with its own conclusion as to whether the claimant has sustained the burden of proof. In other words, that when the decision of the Com-

mission is against the claimant the Court will pass upon the facts.

This Court has expressed approval of such interpretation of *Orff's Case* and of the resulting rule as to review in *Ferris's Case,* 132 Me., 31, 165 A., 160; *Weymouth* v. *Burnham & Morrill Co.,* 136 Me., 42, 1 A. (2d), 343; *Drouin* v. *Snodgrass Co.,* 138 Me., 145, 23 A (2d), 631 and *McNiff* v. *Town of Old Orchard,* 138 Me., 335, 25 A. (2d), 493, although the decisions rendered in these cases did not depend for their correctness upon the application of such a rule. However, the review resulting from such interpretation is not in harmony with R. S. 1930, Chap. 55, known as the Workmen's Compensation Act, and by which the Court must be guided in its procedure.

Section 36 of the Act says that the decision of the Commission—

> "in the absence of fraud, upon all questions of fact shall be final."

Section 40 says as to the pro forma decree provided for:

> "there shall be no appeal therefrom upon questions of fact found by said Commission . . . ",

and further:

> "and the law court may, after consideration, reverse or modify any decree so made by a justice based upon an erroneous ruling or finding of law."

The Commission, by the Act, is made the trier of facts and its findings thereof, whether for or against the claimant, are final; but in arriving at its conclusions it must be guided by legal principles. Failing in this it commits error of law and it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record.

A finding for the moving party must be founded upon some competent evidence. *Mailman's Case,* 118 Me., 172, 106 A.,

606. But it must be wholly upon such evidence. If the finding is founded in whole or in part upon incompetent or illegal evidence error has been committed and the finding will not be sustained. *Gauthier's Case,* 120 Me., 73, 113 A., 28; *Hinckley's Case,* 136 Me., 403, 11 A. (2d), 485. If there is any evidence in support of such finding it cannot be set aside. *Simmons's Case,* 117 Me., 175, 103 A., 68; *Westman's Case,* supra and *Mailman's Case,* supra. The sufficiency of the evidence will not be passed upon, but it must be competent and have probative force. *Williams' Case,* 122 Me., 477, 120 A., 620; *Adams' Case,* 124 Me., 295, 128 A., 191; *Mailman's Case,* supra; *Westman's Case,* supra. If the findng is against the moving party it must appear that evidence in favor of the moving party was not, in the minds of the Commission, sufficient to sustain the burden of proof against the evidence of the defendant, or that there is absence of any evidence in favor of the moving party, in which situation it matters not whether there be evidence in favor of the defendant, for it is a principle applicable to all judicial proceedings that total lack of evidence in favor of the moving party will entitle the defendant to a decision in his favor, a principle too elemental to require citation of authority. Upon either finding by the Commission, in favor or against the moving party, if it is apparent that the Commission has disregarded evidence which has probative force in favor of the party against whom the decision has been rendered, the decision will be set aside. *Ferris's Case,* 123 Me., 193, 122 A., 410; *Farwell's Case,* 127 Me., 249, 142 A., 862.

When the Court examines the record in accordance with the above principles it is not deciding facts, it is asserting its authority to prevent a departure from legal principles and is acting within the contemplation of the statute wherein it is said that the Court may reverse or modify any decree "based upon an erroneous ruling or finding of law."

Further than this the Court will not go and this is so whether the decision of the Commission is in favor of or against the

claimant. The Court will in either case be guided by the statute, which makes the Commission the trier of facts and limits the authority of the Court to questions of law.

We therefore, after careful consideration, disaffirm the claimed interpretation of *Orff's Case,* supra, and the rule as to review that would follow such interpretation and, so far as *Orff's Case,* supra, *Ferris's Case,* 132 Me., 31, supra, *Weymouth* v. *Burnham & Morrill Co.,* supra, *Drouin* v. *Snodgrass,* supra and *McNiff* v. *Town of Old Orchard,* supra, are in conflict with the rule here stated, the same are overruled.

In the instant case there was competent evidence in favor of the claimant and of the defendant respectively. Whether the claimant had sustained the burden of proof was the problem of the Commission, a question of fact which cannot be disturbed by this Court.

The entry therefore must be:

Appeal dismissed.
Decree affirmed.

RINALDO A. L. COLBY,

vs.

JESSE TARR AND DEPOSITORS TRUST CO., TRUSTEE.

Sagadahoc. Opinion, November 3, 1943.

Exceptions. Motion for Dismissal.

Allowance of a bill of exceptions in the Superior Court represents decision therein that it was presented and filed in conformity with law and practice, and is not reviewable on the issue of the time of filing on motion addressed to the Law Court.

Such allowance is final also as to the truth of the exceptions stated when the party opposing them has taken no proceedings in the Superior Court to frame an issue for appellate determination under Chapter 91, Section 24, R. S. 1930.

The merits of exceptions are not in issue on motion for summary action in the Law Court.

Parties to litigation may, with the consent of the court, waive the requirements for the filing of exceptions, either expressly or by implication.

When exceptions have been allowed, it is too late to attempt reformation by way of amendment.

ON PETITION AND MOTION.

Petition by the plaintiff and motion seeking to have a bill of exceptions allowed the defense, after adverse verdict, summarily dismissed for late filing, or reformed. The time for filing an extended bill of exceptions was fixed in term time at August 15th. A draft was submitted to plantiff on August 9th, which he retained until after the assigned date and later returned to defendants with a redraft of his own preparation, together with a letter stating, if the redraft was not acceptable, he wanted to be heard when the bill was presented for allowance. He did not notify the justice of his desire to be heard. The Court, after

August 15th, extended the filing date and allowed the exceptions as set forth in the draft submitted to the plaintiff by the defendants. Petition and motion dismissed. The case fully appears in the opinion.

McLean, Southard & Hunt, for the plaintiff.

Edward W. Bridgham,

Harry J. Rubin, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. This case was certified to the Law Court on exceptions reserved by the defendant during the trial of the cause in the Superior Court, and his motion for a new trial following an adverse verdict. In term time a docket entry was made fixing August 15th, 1943, as the time for filing an extended bill of exceptions. The defendant prepared such a bill and mailed it to the plaintiff on August 7th. It was received by the latter on August 9th and returned on August 17th with a redraft, and a letter declaring that if the redraft was not acceptable the plaintiff desired to be heard when the bill was presented for allowance to the Justice who presided at the trial. The plaintiff did not notify that Justice of such desire.

The issues raised by the motion and exceptions have not been argued and are not in order for present adjudication, but the plaintiff has presented a combined Petition and Motion to which the defendant's draft of exceptions, which were allowed on September 3rd (without his having been heard), and his redraft are attached as Exhibits and seeks thereunder by appropriate prayers to have the exceptions (1) summarily dismissed for late filing, or, if that relief is denied, (2) declared incomplete and inadequate, when of necessity an order would issue directing the defendant to file a true bill thereof.

A motion for summary dismissal of exceptions by the court

sitting in *banc* was filed in *Dunn* v. *Auburn Electric Motor Co.*, 92 Me., 165, 42 A., 389, on assertion that "they were not presented and filed in conformity to law and the rules and practice," but this action was taken when the case was argued. Like claim was asserted, apparently without formal motion, in *Poland* v. *McDowell*, 114 Me., 511, 96 A., 834, where the opinion notes that one exception was allowed "after the adjournment of the term." The principle declared in *Dunn* v. *Auburn Electric Motor Co.*, supra, and reaffirmed in *Poland* v. *McDowell*, supra, is controlling as to the prayer that the exceptions be summarily dismissed. The certificate of the Justice who presided at the trial represents his official decision that they were regularly and properly filed and allowed, and such decision is not reviewable. It creates, as stated in *Poland* v. *McDowell*, supra, a conclusive presumption on the point. *Fish* v. *Baker*, 74 Me., 107, is clearly distinguishable from the *Dunn* case as the later opinion carefully notes, and the basis for distinction was recognized in *Royal Insurance Co.* v. *Nelke*, 117 Me., 366, 104 A., 626, which was decided squarely on the authority of *Fish* v. *Baker*, supra. Foundation for the principle of finality rests in recognition that parties to litigation may, with the consent of the court, waive time requirements for the filing of exceptions, either expressly or by implication, and while it is not necessary that the record show support for a finding of waiver, it is obvious that inference thereof might fairly have been drawn from the facts that the plaintiff was presented with a draft of exceptions before the assigned closing date for filing, that he retained possession thereof until after that date, and thereafter submitted a redraft for consideration by his opponent.

As to the alternative relief, the plaintiff purports to proceed under R. S. (1930), Chap. 91, Sec. 24, and Rule 40 of the rules governing procedure in the Supreme Judicial and Superior Courts. The pertinent statutory language declares that:

"the truth of the exceptions presented may be established before the supreme judicial court sitting as a court of law, upon petition setting forth the grievance."

Earlier language indicates that this remedy is available if either party is aggrieved when a single Justice (1) disallows written exceptions presented to him, (2) fails to sign them, or (3) "alters any statement therein." The Rule is obviously intended to provide machinery to accomplish the result contemplated by statute. It specifically outlines procedure whereby a party claiming to be aggrieved by non-action on his exceptions for 10 days may frame an issue which will disclose his grievance and have it determined at the next ensuing law term. It is clearly limited to cases where exceptions have not been allowed. The statute language, "either party is aggrieved," carries import that relief was intended to be available to both parties to litigation, but on the particular facts there can be no occasion for determining the rights of the exceptant's adversary since he, as the moving party in the Petition and Motion, presented no contention to the Justice below as to what should appear in the extended bill. *Mann* v. *Homestead Realty Co.*, 134 Me., 37, 180 A., 807, presents an instance where, as in *Dunn* v. *Auburn Electric Motor Co.*, summary action on a bill of exceptions was sought by motion addressed to the Law Court praying for the amendment thereof, and this in effect is the remedy sought by the prayer that the present bill be declared "incomplete and inadequate." That case decided that allowance of a bill of exceptions was as final and conclusive with reference to its contents as to its proper filing and allowance, the *Dunn* and *Poland* cases being cited as authority. The alternative relief prayed for must also be denied.

This Court has not heretofore had occasion to prescribe how a party opposing exceptions should proceed to assure inclusion in his opponent's bill of material which he believes should

be included to make them true. It is obvious, however, that his starting point must be prior to the allowance of the extended bill and before the Justice whose function it is to pass thereon. It might be by representation before the presentation of an extended bill, or by specific objections to a prepared draft. When exceptions have been allowed, it is too late to attempt reformation by way of amendment.

The bill of exceptions as allowed and its redraft comprise respectively 14 and 28 pages of typewritten matter, including quotations of substantial length from the testimony. Had they been presented to the Justice below, it would have been his function to determine which, if only one, presented a true bill, or which, if both might be said to be true, he would allow as best presenting the issues raised by the exceptions. It would have been his right to insist that the plaintiff specify his grievance or grievances and not leave that problem for discovery by comparison of the drafts one with the other and collation of both with the record. It is not the function of this Court to undertake such an analysis. Fortunately the case stands on the law docket for argument on a motion for new trial as well as on exceptions, and the entire record will be available to forestall possibility that plaintiff will suffer by the omission from the bill of exceptions of any material that might properly have been included therein.

The present mandate, which in no way affects the merits of the case presented on the motion and exceptions, is

Petition and Motion dismissed.

MARY SWEENEY *vs.* HENRY DAHL.

Cumberland. Opinion, November 10, 1943.

Forcible Entry and Detainer. Statutes.

The action of forcible entry and detainer cannot be maintained by the alienee of property against a tenant at will of the former owner as a disseizor without notice to the tenant of the alienation, or knowledge of the same by the tenant.

A termination of a tenancy at will by alienation of the premises is by operation of law, and not by will of the parties.

The plaintiff in an action in forcible entry and detainer must bring his case within the statute and within the allegations of his declaration.

It is necessary to distinguish between the statutory notice necessary to terminate a tenancy by will of the parties and a notice to the tenant after the termination of the tenancy by operation of law.

If a term used in the statute has a legal meaning, it is presumed that the legislature attached that meaning to it.

The action of forcible entry and detainer was originally a quasi criminal process, and, while it is now civil in its aspect, it has retained its highly tortious character. In an action of tort a tort must be alleged and proved, and to constitute a tort there must be a wrong done.

Every opinion must be read in the light of the facts then presented.

ON EXCEPTIONS.

Action of forcible entry and detainer was brought by the plaintiff in the South Portland Municipal Court. Judgment was there given for the plaintiff. Defendant appealed to the Superior Court, where the case was submitted to the presiding justice upon an agreed statement of facts. According to the agreed statement, the defendant was a tenant at will. The owner leased the premises to the plaintiff, who brought action against the tenant as a disseizor. No notice of the alienation was given to the tenant before the action was brought and it

did not appear that he had knowledge of the lease to the plaintiff. The Justice of the Superior Court ruled that notice of the lease to the tenant was not necessary for the prosecution of the action and gave judgment to the plaintiff for possession of the premises and for damages to be assessed by the Clerk of Courts. The defendant filed exceptions. Exceptions sustained. The case fully appears in the opinion.

Charles A. Bartlett, for the plaintiff.

Elton H. Thompson,

Walter F. Murrell, for the defendant.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J., dissenting.

CHAPMAN, J. The case comes to this Court upon exceptions filed to rulings and final decision of the presiding Justice of the Superior Court. The action of forcible entry and detainer originated in the South Portland Municipal Court and went to the Superior Court upon appeal, where it was submitted to the presiding Justice, sitting without a jury, on an agreed statement of facts with right of exceptions reserved.

The facts essential to the consideration of the case, as they appear in the agreed statement, made a part of the bill of exceptions, are as follows:

The defendant, as a tenant at will, occupied premises consisting of house and garage. The owner leased the premises to the plaintiff, who brought action of forcible entry and detainer for possession of the premises against the tenant, without notice of the lease to the tenant, to enable him to vacate the premises before suit was brought.

It does not appear from the agreed statement that the defendant had knowledge of the lease. The plaintiff claimed that

the tenant, by reason of the termination of the tenancy alone, became subject to an action of forcible entry and detainer for the possession of the premises. The Justice ruled that the lease terminated the tenancy and that notice to the tenant of the lease was not necessary for the prosecution of the action and gave judgment to the plaintiff for possession of the premises and for damages to be assessed by the Clerk of Courts.

The essential allegation in the plaintiff's declaration is that the defendant—

> "disseized the said Plaintiff of her lands and tenements" . . . "and then and there and still does forcibly and unlawfully refuse to quit the same."

Authority for the complaint as set forth is found in the first clause of Sec. 1, Chap. 108 of the Revised Statutes of 1930, which reads as follows:

> "Sec. 1. FORCIBLE ENTRY AND DETAINER, AGAINST WHOM MAINTAINED. Process of forcible entry and detainer may be maintained against a disseizor who has not acquired any claim by possession and improvement;"

So much of the clause as refers to claim by possession and improvement does not affect the consideration of the instant case. The second clause in the section provides that the action may be maintained—

> "against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice, if commenced within seven days from the expiration or forfeiture of the term;"

And a third clause provides that the action may be maintained—

"against a tenant at will, whose tenancy has been terminated as provided in the following section."

The following section provides that —

"Tenancies at will may be determined by either party, by thirty days' notice in writing for that purpose, given to the other party, and not otherwise save by mutual consent, ..."

It is to be noted that Sec. 1, as worded, makes the process available in two classes of cases: The one applying exclusively to situations existing between landloards and tenants and the other to a withholding of possession by a disseizor, irrespective of whether the disseizor's possession originated in a tenancy or otherwise.

The first clause under which the action was brought makes no mention of tenancy, and if it is within that clause it is not necessary that the person against whom the action is brought be a tenant. *Baker* v. *Cooper*, 57 Me., 388, 390. The essential element is that he be a disseizor. Lacking this element the clause does not apply. *Holding Co.* v. *Bangor Veritas*, 131 Me., 421, 163 A., 655. The clause under which the action was brought is therefore independent of the two clauses following and takes no meaning from them. *Woodman* v. *Ranger*, 30 Me., 180; *Eveleth* v. *Gill*, 97 Me., 315, 54 A., 756. We, however refer to the three clauses inasmuch as we believe there has been a confusion by reason of the grouping of the two classes of cases in one section, and it is necessary to distinguish in adjudicated cases when the Court is referring to the statutory notice necessary to terminate a tenancy by will of the parties, as provided in the last clause of the section, and when it is referring to a notice to the tenant after the termination of tenancy by operation of law, a disregard of which notice will constitute him a disseizor and make the action of forcible entry and detainer available against him. A termination of a tenancy

at will by alienation of the premises is by operation of law and not by will of the parties. *Howard* v. *Merriam,* 5 Cush., 562, 574; *Seavey* v. *Cloudman,* 90 Me., 536, 38 A., 540.

The substance of the accusation in the declaration is that the defendant was a disseizor. It is made in the words of the statute and the question to be decided is not merely whether the tenancy was terminated, but whether the tenant, by reason of the termination of his tenancy by the act of his landlord, was made a disseizor and subject to the action without notice of the same whereby he would have been able to vacate the premises before suit was brought.

The plaintiff must bring his case within the statute and his allegation. *Eveleth* v. *Gill,* supra. The Court said:

> "It follows under the general law of pleading that the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used."

So far as the question is raised as to the effectiveness of the lease in terminating the tenancy of the defendant, the Justice was correct in his ruling. A deed or lease from the owner to a third party will terminate a tenancy at will, and the Court will not inquire as to the purpose of the conveyance. *Rancourt* v. *Nichols,* 139 Me., 339, 31 A. (2d), 410, and cases therein cited. But this is not to say that the conveyance by the owner makes a disseizor of the tenant.

Were the facts set forth in the agreed statement, viz., that the owner alienated the premises without notice of the same to the tenant and without evidence of knowledge of the same on the part of the tenant, sufficient to maintain her allegation that the defendant disseized her? Another way of asking the question is: Did the tenant become a disseizor by the act of another person, over which act he had no control and of which he had no knowledge?

If a term used in the statute has a legal meaning it is presumed that the Legislature attached that meaning to the same. Endlich on the Interpretation of Statutes, Sec. 74; *Merchants Bank* v. *Cook*, 4 Pick., 405, 411.

The term "disseizor" is strictly a legal term and carries a wrongful import. Lord Coke said:

> "A disseizor is where one enters intending to usurp the possession and to oust another of his freehold." . . . and, "Or if a man interveneth into lands of his own wrong and take the profits his words to hold it at the will of the owner cannot qualify his wrong, but he is a disseizor." Co. Lit., 277.

Mr. Kent said:

> "Every disseizin is a trespass, but every trespass is not a disseizin. A manifest intention to oust the real owner must clearly appear, in order to raise an act which may be only a trespass to the bad eminence of disseizin." 4 Kent, 11th ed., 487.

18 C. J., 1284, says:

> 'The clearest and most comprehensive definition of a disseizin perhaps, is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim, of right, either under an openly avowed claim, or under a constructive claim arising from the acts and circumstances attending the appropriation to hold the land against him who was seized."

In *William* v. *Thomas*, 12 East, 141, disseizin was defined as—

> "the putting out of a man out of seisin, and ever implieth a wrong."

Our own Court said in *Stetson* v. *Veazie*, 11 Me., 408, 410: "for a disseizin is of itself a wrong."

That the term "disseizor," as contained in the statute, is to be given its common law meaning, is stated in *Reed* v. *Elwell*, 46 Me., 270, 279, where the Court said:

> "The disseizin contemplated by this statute, is not a disseizin which exists only at the election of a party, for the purpose of trying his title, but a disseizin at common law."

And again in *Dyer* v. *Chick*, 52 Me., 350, 354, the Court adopted the common law meaning when it said:

> "Disseizin is a wrongful putting out of him that is seized of a freehold. Co. Lit., 277."

The clause of the statute now under consideration existed in the same terms, at the respective dates of these two cases, except that the present statute says,—

> "Process of forcible entry and detainer may be maintained . . . . ",

whereas the earlier statute said,—

> "Process of forcible entry and detainer may be commenced . . . ".

That the Legislature intended to attach to the term "disseizor" the meaning above indicated is in harmony with the designation of the form of the action to be used. It is true that the Legislature has defined the use of the action of forcible entry and detainer and likewise has defined the procedure, but it is to be presumed that it had in mind the nature and general scope of the action and intended to give it such import as is not taken away by the terms of the statute. Endlich on the Interpretation of Statutes, Sec. 127. It no doubt selected this form of action, with the changes made in its procedure, as an appropriate remedy against one who wrongfully withholds possession from the one rightfully entitled to the same.

The action of forcible entry and detainer was originally a quasi criminal process, and, while it is now civil in its aspect, it has retained its highly tortious character. In an action of tort a tort must be alleged and proved, and to constitute a tort there must be a wrong done. 62 C. J., Torts, Sec. 17; *Heywood* v. *Tillson*, 75 Me., 225, 236, 237, 46 Am. Rep. 373.

In *Eveleth* v. *Gill*, supra, Judge Emery spoke as follows:

> "The summary process of forcible entry and detainer at common law was a criminal, or quasi criminal, process and was only allowed where the entry and detainer were with force, the strong hand. The legislature of this state has devised a process of the same name, but now purely civil in form and nature, for the cases specified in the statute. It follows under the general law of pleading that the plaintiff in such a process should allege in his declaration the facts declared by the statute to be an occasion where the process may be used. Thus it was said by this court in *Treat* v. *Bent*, 51 Maine, 478, 'This process of forcible entry and detainer is one created and regulated by the statutes, and in order to be maintained, must come clearly within their provisions.' "

Gilbert v. *Gerrity*, 108 Me., 258, 80 A., 704.
Karahalies v. *Dukais*, 108 Me., 527, 81 A., 1011.

The Legislative intent in a statute must primarily be ascertained from the language thereof and not from conjecture. In other words, the Court will first seek to find the Legislative intention from words, phrases and sentences which make up the subject matter of the statute. If the meaning of the language is plain the Court will look no further; it is interpreted to mean exactly what it says. Crawford's Statutory Construction, Sec. 164.

Estabrook v. *Steward Read Co.*, 129 Me., 178, 151 A., 141.
Adams Express Co. v. *Kentucky*, 238 U. S., 190, 199, 35

S. Ct. 824, 59 L. Ed., 1267, L. R. A. 1916 C, 273, Ann. Cas. 1915D, 1167.

In view of the generally accepted meaning of the language of the statute we would feel justified in interpreting the clause under which the action is brought without further consideration, except that we believe there has been, in some quarters, a mis-interpretation of some of the adjudicated cases.

In our own state and in the state of Massachusetts, which has had a statute which, although differently worded, is of the same general purpose as the Maine Statute, the Courts have several times held that a conveyance of property will terminate a tenancy and have held that, in such case, the notice which is required to terminate a tenancy by the will of the landlord is not necessary before bringing forcible entry and detainer against the tenant. And in some of the cases the language of the Court has been such that it might appear that the Court had held that *no* notice was necessary to the tenant; but in each case a careful examination will show that the Court was referring only to the statutory notice necessary to terminate the tenancy by will of the parties.

In the case of *Seavey* v. *Cloudman,* supra, which was an action of trespass *quare clausum* by the tenant against a representative of a grantee of the landlord for entry after the conveyance, the Court held that the tenancy was terminated by the conveyance and that notice was not necessary to effect the termination; but the Court stated in its opinion that the tenant had been given notice of the conveyance and notified to vacate, and that the issue before the Court was whether the tenant was entitled to the notice provided for in the statute to the effect that —

> "Tenancies at will may be determined by either party, by thirty days' notice in writing for that purpose, given to the other party, and not otherwise save by mutual consent," ....

The decision was that the tenant was not entitled to that notice. It is not to be interpreted as holding that knowledge of the conveyance need not be brought home to the tenant before he could be treated as a disseizor. The opinion by Judge Savage cited the case of *Howard* v. *Merriam,* supra, and adopted the reasoning and the language of Chief Justice Shaw, who said:

> "When therefore it is thus determined by operation of law it is determined by its own limitation without notice."

But Judge Shaw also said in his opinion:

> "the estate at will was determined by act of law; and the defendant then became a tenant at sufferance only. *By the notice of that lease for years, and the entry of the lessee for years, and demand of possession by him,* the defendant's right of possession ceased;" (Italics ours).

The case of *Karahalies* v. *Dukais,* supra, was an action of forcible entry and detainer in which the Court held that the plaintiff had not stated a case under the statute, quoting from *Treat* v. *Bent*:

> "This process of forcible entry and detainer is one created and regulated by the statutes, and, in order to be maintained, must come clearly within their provisions."

The question now before us, therefore, was not in issue, but the Court, in that part of its opinion wherein it said that forcible entry and detainer is the proper form of action against a tenant whose tenancy has been terminated by alienation by the landlord, might seem to indicate that the action could be brought without notice to the tenant; but the Court had prefaced this statement by saying in its outline of the case that a written notice of the alienation and demand for possession had been given to the tenant who had refused to vacate.

The case of *Bennett* v. *Casavant,* 129 Me., 123, 150 A., 319,

was an action of forcible entry and detainer, as the opinion states, against a "disseizor." The opinion was brief and it held that the conveyance by the landlord terminated the tenancy at will. But it appears from the opinion that previous to bringing the action of forcible entry and detainer, not only did the tenant have actual knowledge of the lease, but had brought an action against the owner and the lessee to prevent the lease from taking effect. Thus, in all three cases referred to, the tenant had actual notice of the conveyance and it cannot be said that the Court ruled that forcible entry and detainer could be brought without knowledge being brought to him of the termination of his tenancy.

> "Every opinion must be read in the light of the facts then presented." *Swan* v. *Justices of the Superior Court,* 222 Mass., 542, 545, 111 N. E., 386, 388.

In the English case of *Lewis, et als* v. *Baird,* 13 East, 210 (1808), in which a conveyance was made by the owner, Lord Ellenborough said:

> "After the lessor had put the defendant into possession, he could not, without a demand of the possession again and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and trespasser, as he assumes to do by his declaration in ejectment."

In the early case of *Rising, et al.* v. *Stannard,* 17 Mass., 282 (1821), the Court held that a tenant whose tenancy had been terminated by alienation of the premises by the owner, without notice of the alienation, was not a trespasser. It said at p. 287:

> "It may be fairly inferred from these principles, that when an estate at will is determined by an event not within the knowledge of the tenant, his holding over will not amount

to a trespass. Suppose, for example, that the estate at will is determined by the death of the lessor in a distant Country, or by his conveyance of the land, of which the tenant can by no possibility have notice at the time of such death or conveyance; it would hardly be contended that the tenant, by holding over, becomes a trespasser. For as the law allows him a reasonable time to remove, after notice given him to quit, he cannot be bound to quit without notice."

And the Court quoted Blackstone:

"If a man makes a lease at will and dies, the estate at will is thereby determined. But if the tenant continueth possession, he is a tenant at sufferance. This estate may be destroyed, whenever the true owner shall make an actual entry on the lands, and oust the tenant; for before entry he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger; and the reason is because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land, by some public and avowed act, such as entry is, will declare his continuance to be tortious."

Several of the later Massachusetts cases, like the Maine cases that we have cited, might be mis-interpreted.

In *Kinsley* v. *Ames*, 2 Met., 29, the owner of the property made conveyance and the grantee notified the tenant to vacate. Upon entry thereafter the grantee was forcibly resisted and the Court held that the summary process could be maintained. The opinion by Chief Justice Shaw stated that the defendant was not entitled to notice, but it is apparent that the notice referred to in the opinion was the statutory notice to terminate a tenancy by will of the parties, as the issue raised

was upon the claim of the defendant that he was entitled to three months' notice as provided in the statute for the termination of a tenancy by will of the parties.

In the case of *Benedict, et al* v. *Morse,* 10 Met., 223, conveyance was made by the owner and a notice of the conveyance given to the tenant. The Court in this case stated that no notice to the tenant was necessary, but it stated in the opinion that the issue was as to—

> "whether the defendant was tenant at will of the estate occupied by him, and, as such, entitled to three months' notice to quit, before this process could be legally commenced."

The Court cited cases in support of its decision and in each such case stated as a part of the facts that notice of the conveyance had been given to the tenant previous to the bringing of the action.

In the case of *Howard* v. *Merriam,* supra, Chief Justice Shaw reviewed many cases and he stated that a tenancy at will is terminated by a conveyance by the owner, but the case shows that notice in writing had been given to the tenant of the conveyance; and Judge Shaw referred to the notice and the demand for possession as an element in defeating the right of possession by the tenant. That the finding was to this effect is cited in 28 L. R. A., 99n.

All question, however, as to what the Massachusetts Court intended was settled by Chief Justice Shaw in his opinion in *Furlong* v. *Leary,* 8 Cush., 409, in which case he passed directly upon the question that we have before us and said:

> "But it is found as a fact, in the present case, that the defendant had no notice of the lease of Kempton to the plaintiff, until he was served with process under this complaint; we think, therefore, that the complaint was prematurely brought. It is a rule, founded on the plainest

> principles of equity and fair dealing, that where a right of action depends on a fact peculiarly within the knowledge of the plaintiff, and which the other party may not be presumed to know, and does not in fact know, the plaintiff must give the defendant notice of such fact. No form of notice being prescribed by positive law, the form of notice is immaterial, but the fact is essential."

This finding was cited in L. R. A. 1918, 58n. The rule thus laid down has been followed consistently by the Massachusetts Courts.

McFarland, et als v. *Chase,* 7 Gray, 462.
Mizner v. *Munroe,* 10 Gray, 290.
Pratt v. *Farrar,* 10 Allen, 520.
Decker v. *McManus,* 101 Mass., 63.
Lawton v. *Savage,* 136 Mass., 111.
Dixon v. *Smith,* 181 Mass., 218, 63 N. E., 419.

In the latter case the Court quoted the language of Judge Shaw in *Furlong* v. *Leary,* supra.

In the case of *Sullivan, et ux.* v. *Carberry,* 67 Me., 531, 532, Chief Justice Appleton, in commenting upon the rights of the plaintiffs who maintained, as tenants at will, a building upon the land of another, said:

> "Not knowing when their rights would terminate, they would have a reasonable time after such termination in which to remove any fixtures they might have erected upon the land."

The principle upon which the statement is founded is not directly in point with the issue that we have before us, but the principle would not be consistent with a rule that a tenant whose tenancy has been terminated without his knowledge will not be entitled to notice and reasonable time in which to vacate before being declared a disseizor.

The situation of the tenant is analagous to that of a bailee in possession of personal property. If goods have rightfully come into his possession neither replevin nor trover may be maintained against him without demand and refusal or some act upon his part antagonistic to the rights of the owner.

Eveleth v. *Blossom,* 54 Me., 447, 92 Am. Dec., 555; *Acceptance Corp.* v. *Littlefield, Crockett Co.,* 128 Me., 389, 147 A., 868; *Galvin* v. *Bacon,* 11 Me., 28, 25 Am. Dec., 258; *Dean* v. *Cushman,* 95 Me., 454, 50 A., 85, 55 L. R. A., 959, 85 Am. St. Rep., 425.

If the owner of goods delivers the same to a bailee for hire (rents them) and afterward gives a bill of sale to a third party, the grantee is subject to this rule. We know of no principle upon which it can be said that the bailee is entitled to more consideration than the tenant.

If the action can be maintained against the tenant without notice, he can be made to answer to a judgment carrying costs and execution running against the body. Sec. 45, Chap. 124, R. S., and this without opportunity of avoiding such liability. We do not think that such is the law.

The defendant was entitled to notice of the lease before action was brought.

It is not necessary to pass upon other questions raised in the bill of exceptions.

Exceptions Sustained.

Dissenting Opinion

MURCHIE, J. I am unable to concur. Practice which has the sanction of long use should rarely be cast aside, and never so, in my opinion, without a clear declaration of the procedure which should take its place.

The decision that forcible entry process is not available for an alienee of property, against the former tenant at will of his

alienor in possession, until after opportunity has been given the latter to vacate the premises without suit, is contrary to earlier decisions in this Court and to the trend of a considerable line thereof. The majority declares the procedure attempted to be used by the plaintiff in the instant case improper, but fails entirely to state how an alienee entitled to the possession of property should proceed to secure it.

In the majority opinion, hereinafter referred as the "Opinion," emphasis, laid by *italics*, on words quoted from *Howard* v. *Merriman*, 5 Cush., 563, implies that notice, entry and demand are all requisite, but there is suggestion that notice may be sufficient, if time is allowed for removal, and recital that the defendant in *Bennett et al.* v. *Casavant*, 129 Me., 123, 150 A., 319, had knowledge that an instrument of alienation had been executed by his former landlord, and delivered to the plaintiffs, indicates that notice in such circumstances is unnecessary, although it is difficult to understand how a time element could then be measured. The words controlling the decision, that "defendant was entitled to notice of the lease before action was brought," adjudicate that notice, or something equivalent thereto, and time, for which no equivalent is possible, are both essential. The time factor is not delimited.

Of eight exceptions presented, three have no merit. Neither the first nor the second alleges a specific error of law, and the eighth is untenable under the principle declared in *Bennett et al.* v. *Casavant*, supra, that fraud will not vitiate the power of a lease to determine a tenancy at will, and the right to occupy premises thereunder. The third, fourth and seventh relate to demand rather than notice, although the last alleges error in failure to distinguish between the two. Since demand is not mentioned in the Opinion, except by way of comment on *Karahalies* v. *Dukais*, 108 Me., 527, 81 A., 1011, and *Howard* v. *Merriam*, supra, and in quotations from cases, the decision must rest on the fifth and sixth exceptions which allege that "there could be no disseisin," respectively, until the parties

made it so by their acts, or without intent on the part of the defendant "to exclude the plaintiff from her rights."

Decision on either of these grounds, if time for removal is requisite, is directly opposed to *Rancourt* v. *Nichols,* 139 Me., 339, 31 A., (2d), 410, where lease, notice and process were executed, given and commenced on the same day, and, if the time element must be measured from notice, or knowledge that an alienee desires possession as distinguished from knowing that he has acquired the right thereto, it is incompatible with *Bennett et al.* v. *Casavant,* supra. Neither in that case nor in the language used in the Opinion to distinguish it from the present one is there implication that the defendant knew the plaintiffs sought possession previous to the service of process upon him. The opinion therein carries no intimation that the dates of lease, knowledge and process were alleged, proved or considered. That they were not deemed important is clearly implied in declaration that the lease "put an end to the right of the defendant to occupy the demanded premises." For this broad statement, rather than the more limited one that alienation determined the tenancy, the *Bennett* case cites *Seavey* v. *Cloudman,* 90 Me., 536, 38 A., 540, and dictum in *Karahalies* v. *Dukais,* supra. Neither goes quite so far, unless determination of tenancy ends the right of occupation, but both declare the process appropriate for use by an alienee, and neither alludes to necessity for either action on his part, or the lapse of time, before service of process on the former tenant of his alienor.

Unless the Opinion is intended to declare a time factor involving more than one day, the decision runs counter also to *Karahalies* v. *Dukais,* supra. There lawful entry, determination of tenancy, demand for possession and refusal to quit were all present, and the Court recognized that the plaintiff relied upon disseisin and might have prevailed on that ground, but recovery was denied because the declaration did not allege that the defendant was either a disseisor, or a tenant whose estate had been determined under the statute.

The above cases do not include all that are contravened by the present decision. In *John et al.* v. *Sabattis,* 69 Me., 473, and *Folsom* v. *Clark,* 72 Me., 44, possession was recovered against former tenants of deceased life tenants, as disseisors, without intimation of need for declaration, or proof, of notice, knowledge, demand for possession, or time for removal. Before either of these Chief Justice Whitman had stated, in *Wheeler* v. *Wood,* 25 Me., 287, that one in the situation of the present defendant was "a disseisor, or tenant at sufferance," indicating his view, and that of the Court for which he spoke, that there was no distinction between the two so far as right to possession was concerned. Reference in the Opinion to a notice "disregard of which" (by a tenant at sufferance) "will constitute him a disseisor" suggests that the process is not available against a tenant at sufferance, whose earlier tenancy at will had been determined by operation of law, until he asserts a possession which, if continued, would give him a possessory title.

The decision is grounded in construction of our statute, fortified by Massachusetts authority. The theme which underlies construction is that the process if of "a highly tortious character," for which no authority is cited, nor can any be found in either textbook or decided case, although 36 C. J. S., 1146, Par. 3, says that the action sounds "in tort," when it provides remedy "against forcible invasion." The same thought is expressed in the definition of the word "disseisin" in 18 C. J., 1284. Following the material quoted in the Opinion, the text continues:

> "The term also has been judicially defined as an ouster; an actual ouster; a tortious ouster; . . . Disseisin occurs only when an entry is made . . . unlawfully . . . with the intent to hold . . . under claim adverse."

If the statute as amended in 1850, as hereafter noted, is to be construed in accordance with such a definition, then the enact-

ment of that year did not eliminate the requirement of force, but imposed the more restricted element of intent to exclude the party entitled and restricted rather than enlarged the field in which the process of forcible entry might be used. The cases of *Reed* v. *Elwell et al.*, 46 Me., 270, and *Dyer* v. *Chick*, 52 Me., 350, which are the only ones subsequent to 1850 cited as authority, relate to the rights of mortgagor and mortgagee and decisions in both Maine and Massachusetts have always held forcible entry process inappropriate against a mortgagor before foreclosure.

Prior to the separation of Maine from Massachusetts, the process was available only where actual force was involved. Our first Legislature extended it to reach tenants, after unlawful refusal to quit, Statutes of 1821, Chap. 79; *Wheeler* v. *Wood*, supra; but until 1849, one could proceed under this extension only against his own former tenant, *Wheeler* v. *Wood*, supra, and then only when the unlawful holding exceeded 30 days, *Clapp* v. *Paine*, 18 Me., 264; *Smith* v. *Rowe*, 31 Me., 212; *Dutton* v. *Colby*, 35 Me., 505. Until 1850 the process could not be used against anyone other than a former tenant of the plaintiff, except where the entry or detainer alleged was both "unlawful and forcible," R. S. (1840), Chap. 128, Sec. 2; *Wheeler* v. *Wood*, supra. The last is one of two leading cases heretofore decided under our statute and affirms the principles which in 1845, and at earlier times, controlled its application. It is neither cited nor mentioned in the Opinion, perhaps because of the comment heretofore quoted from it, and declarations that a tenant at sufferance has no estate in property, and may be turned out "without ceremony."

Inquiry as to legislative intention, underlying R. S. (1930), Chap. 108, Sec. 1, should be directed to the enactments of 1847, 1850 and 1853, to which its provisions trace back, but there may be helpful indication in an 1849 law, incorporated in 1857 in the following section. P. L. 1847, Chap. 4, is not pertinent to the present inquiry, although it extended the avail-

ability of the process in a minor degree. P. L. 1849, Chap. 98, opened it for use against an occupant of property who had never been a tenant of the plaintiff, and P. L. 1853, Chap. 39, eliminated the notice earlier required in tenancy cases after an estate had been determined. The major change during the years 1847 to 1853 inclusive, as during the whole life of the statutory process, was made by P. L. 1850, Chap. 160. There the requirement of force was eliminated, and the word "disseisor" first appeared in the statute, substituting whoever might be so described for one whose entry or detainer was both unlawful and forcible, and provision was included that the process would lie against either a former tenant or a disseisor without notice to quit. This notice to quit could not have been the statutory one for determining a tenancy, for concurrent proviso was that proceedings against a former tenant must be commenced within 7 days of the expiration or forfeiture of his term. It is palpable that legislative intention in 1850, as in 1847 and 1849, and later in 1853, was to extend the process and expedite recovery under it. It is probable that the word "disseisor" was used with intention and expectation, in the light of the court declaration made 5 years earlier in *Wheeler* v. *Wood*, supra, that it would be interpreted to include tenants at sufferance. Many years later *Hathorn* v. *Robinson et al.*, 98 Me., 334, 56 A., 1057, carried comment that the framers of a statute might use a particular word in expectation that its interpretation would follow that declared in decided cases.

The phraseology of P. L. 1850, Chap. 160, was changed in our statutory revision of 1857 so that the authorization for process without notice may be read as applicable only to former tenants, and at the same time P. L. 1849, Chap. 98, was placed in a section which deals exclusively with tenancies at will, but in seeking to ascertain legislative intent from the use of words, the context in which they were originally placed should be given consideration, rather than an adaptation arranged in the work of statutory revision.

The original sources of our present statute are not mentioned in the Opinion which bases construction on the single word "disseisor" and fortifies the result by reference to an opinion which does not use the word in rendering decision under a statute in which it did not appear, *Furlong* v. *Leary*, 8 Cush. (Mass.), 409. Reference to the case shows a proceeding instituted under the Massachusetts statute, which appears as Chapter 104 of the Massachusetts Statutes in the revision of 1836. This relates back to a law enacted in 1825 (Chapter 89). *Hildreth* v. *Conant*, 10 Met., 298, decided in 1845, quotes section 1 of the 1825 law in words very different from those appearing in the revision. The original enactment provided, as the case states, that:

> " 'where the tenant or occupant of any house or tenement shall hold such house or tenement without right, *and after notice in writing to quit the same,* whoever has the right of possession thereof may summon such tenant or occupant' etc."

The phrase relative to notice is *emphasized* for the dual purpose of (1) noting that its quotation, 9 years after the revision, demonstrates that the court referred back to first sources in construing a statute as currently phrased, and (2) calling attention to the fact that no language of like import has ever appeared in our own statute.

The Opinion refers to a review of earlier decisions in *Howard* v. *Merriam*, supra, but fails to note that the case carries also a review of legislation which seems to forecast the decision in *Furlong* v. *Leary*, supra, in declaration that the process did not reach "every wrongdoer, or person holding possession . . . without right." These words clearly imply, contrary to the Opinion, that one who occupies without right is a wrongdoer, for a tenant at sufferance has no estate in, or right to occupy, premises, *Wheeler* v. *Wood*, supra. The Opinion does not cite the second of our own leading cases, *Dunning* v. *Finson*, 46 Me.,

546, where it is disclosed that the review of legislation in *Howard* v. *Merriam,* supra, had been read and appreciated. That case carries one statement of especial force in view of the emphasis laid on Massachusetts decisions in the Opinion. After earlier declaration that the language of the Massachusetts statute was more restricted than our own, it is expressly stated that:

> "cases in Massachusetts cannot control the plain language of our statute on this subject."

The *Dunning* case is cited in Lawrence's Maine Digest as declaring forcible entry process maintainable against a tenant at sufferance without notice. It may be doubted that the decision represents square authority on the point, although the court, in stating that the statute does not include a tenant at sufferance "in terms," seems plainly to imply that it is applicable to such a tenant, and if so applicable, it can be so only on the theory that his rights are similar to and no greater than those of such a tenant. In *Gower* v. *Watters,* 125 Me., 223, 132 A., 550, 45 A. L. R. 309, declaration in the *Dunning* case, that the holding of a tenant at sufferance is without right of any kind, was reaffirmed.

There can be no doubt that one who continues in possession of property after the expiration or forfeiture of his own leasehold estate, or that of another under whom he holds, becomes a tenant at sufferance, and this whether the forfeiture results from his own act or that of his landlord, if he be a sub-tenant. It is equally clear that he has no right to continue in possession, to notice, or to time for removal, for such is the express mandate of our law making authority, declared in the very statute construed by the Opinion. There is no statute authority for dividing tenants at sufferance into classes and vesting rights in those who become such by the determination of estates at will through operation of law greater than are held by others who acquire the status in different manner. It is the law, notwith-

standing the statement of the Opinion contra, that one who entered property lawfully as a tenant, if his estate had been determined by forfeiture resulting from his own act or that of another, may, without notice (or time for removal), be "made to answer to a judgment carrying costs and execution running against the body" *sans* opportunity to avoid liability, unless our courts, following decisions like those rendered in Mississippi, New York and Oklahoma, in *Rabe* v. *Fyler*, 18 Miss., 440, 38 A.D., 763; *Mandel* v. *Fertig*, 65 Misc., 310, 121 N.Y.S., 669; and *Obert* v. *Zahn*, 45 Okla., 219, 145 P., 403, determine that judgment will not be entered (for costs) in forcible entry cases when a defendant vacates before return day. The statutes under which these cases were decided may be very different from our own, but the pleading suggested for defendant's protection in the Oklahoma case has heretofore been used effectively in this jurisdiction. In *Hilliker* v. *Simpson*, 92 Me., 590, 43 A., 495, plaintiff sought recovery by writ of entry of both real estate and rents and profits, but after a plea *puis darrien continuance*, asserting a title acquired subsequent to the commencement of the process, the plaintiff's claim for rents and profits was declared "a mere incident to the right to the land itself." The issue in forcible entry process is the right to possession alone, and if a defendant eliminates necessity for adjudication thereon by yielding possession before return day, refusal to award costs against him might well be based on determination that they were purely incidental to that recovery of possession which the statute authorizes.

Costs in the Municipal Court in the instant case, when decision was first rendered that fraud did not vitiate plaintiff's lease, would have covered little more, if any, than the price of writ, service and entry. They would now include accruals thereto, resulting from appeal to the Superior Court and the prosecution of exceptions against the decision therein. It may fairly be said that, except for a negligible amount, the costs which judgment against the defendant would impose presently

have accrued principally by his insistence upon an untenable principle of law. He asserts no claim here, nor did he in either of the courts below, that it is unjust to require him to pay costs because he had no opportunity to avoid liability by vacating the premises before suit was brought. Such is the unsolicited relief which the majority of the Court is conferring upon him. His assertion in the Municipal Court, in the Superior Court, and on his exceptions was, and is, that the plaintiff has no right to possession because he claims under a lease which is tainted with fraud. Decision on that major issue is against him, and it seems to me the mandate should be

Exceptions overruled.

ALLAN J. FISHER'S CASE.

Cumberland. Opinion, November 19, 1943.

Workmen's Compensation Act.

By the provisions of the Workmen's Compensation Act the Industrial Accident Commission is made the trier of facts and its findings are final if in accord with legal principles.

ON APPEAL.

Claim for compensation was brought before the Industrial Accident Commission under the Workmen's Compensation Act. The claim was denied by the Commission and its decision was affirmed by a justice of the Superior Court. Claimant ap-

pealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Ralph W. Farris, for the claimant.

William B. Mahoney, for the employer, South Portland Shipbuilding Corporation.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

PER CURIAM.

Mr. Fisher appeals from a *pro forma* decree of a Justice of the Superior Court affirming decision of the Industrial Accident Commission denying him as claimant an award of compensation under the Workmen's Compensation Act, Chap. 55, R. S. 1930.

The decision herein is governed by *George A. Robitaille's Case,* 140 Me., 121, wherein it was held that "The Commission, by the Act, is made the trier of facts and its findings thereof, whether for or against the claimant, are final; but in arriving at its conclusions it must be guided by legal principles. Failing in this it commits error of law and it is the function of the Court to correct such error."

The issue in this case being factual only and no error of law appearing, the appeal must be dismissed.

Appeal dismissed.
Decree below affirmed.

Mr. Justice Chapman did not participate.

GREAVES, TAX COLLECTOR *vs.* HOULTON WATER COMPANY.

Aroostook. Opinion, November 29, 1943.

Taxation. Municipal Corporations.

No tax exemption law is needed for any public property held as such. To entitle it to exemption, however, it must be public in its nature.

The primary objects to be accomplished by a municipal corporation are to promote the welfare and public interest of the inhabitants within its boundaries, and not the promotion of the interests of those residing outside the corporate boundaries.

By legislative action and intendment the corporate entity of Houlton Water Company had been maintained separate and distinct from the town of Houlton and given authority to act in a dual capacity, one as a public municipal corporation, so far as the town of Houlton and its inhabitants were concerned, and the other as a private enterprise in furnishing electric current to twelve other towns and plantations and their inhabitants for their convenience and for its private gain.

In the instant case, the poles and lines owned by the Houlton Water Company in the town of Hodgdon, and used for the transmission and distribution of electricity therein, were held to be subject to taxation by that municipality.

ON REPORT.

Action of debt brought in behalf of the town of Hodgdon to collect a tax levied against the Houlton Water Company upon poles and transmission lines located in Hodgdon used for supplying electricity to the town of Hodgdon and its inhabitants. There has been no legislation, which, in terms, created the Houlton Water Company a quasi municipal corporation, none which designated any territory or the inhabitants thereof as constituting the corporation and none which made the town of Houlton or the property of its citizens liable for the company debts. The town of Houlton did not own the physical property of the corporation but only an equity therein

as represented by the capital stock. By legislative enactment the Company was authorized to supply a number of towns in addition to Houlton with electricity. Such service was apparently solely for the joint advantage of the Houlton Water Company and the users of electricity in the designated towns. The company had been given no right to assume any municipal functions as to the territory outside the town of Houlton. Judgment was for the plaintiff. The case fully appears in the opinion.

Francis W. Sullivan,

Weick & Blanchard, for the plaintiff.

Cook, Hutchinson, Pierce & Connell, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This is an action of debt brought in behalf of the town of Hodgdon to collect a tax levied on the Houlton Water Company, upon poles and transmission lines located in Hodgdon, and used for supplying electricity to that town and its inhabitants. It comes forward on report.

The issue is whether the defendant, in performing this service is, in the statutory sense, a "public municipal corporation." If it is, then the property taxed was exempt from taxation. The exemption is found in R. S., c. 13, §6, Par. I, which, so far as pertinent, reads as follows:

> "The following property and polls are exempt from taxation:
> . . . the property of any public municipal corporation of this state, appropriated to public uses, if located within the corporate limits and confines of such public municipal corporation, and also the . . . fixtures . . . of public municipal corporations engaged in supplying water,

power, or light, if located outside of the limits of such public municipal corporations,"

The term "fixtures" in this particular statute has been held to includes poles and transmission lines. *Whiting* v. *Lubec*, 121 Me., 121, 115 A., 896.

The facts are as follows:

The Houlton Water Company was chartered as a private corporation to supply the people of Houlton and the town itself with water. It was given the right to hold property to the extent of $50,000, to issue certificates of stock for capital paid in, and to sell bonds not exceeding one-half of its paid-up capital stock. P. & S. L., 1880, c. 227.

From time to time its powers and functions were enlarged by legislative amendments. It was authorized to hold property to the amount of $100,000. P. & S. L., 1889, c. 497.

It was granted the right to purchase the capital stock of the Houlton Sewerage Company and to hold property not to exceed $200,000; and to provide the town of Houlton with a system of sewerage. P. & S. L., 1903, c. 148.

Later, it was authorized to supply the town of Houlton and its inhabitants with electricity. P. & S. L., 1905, c. 31.

In the same year it was given the right to purchase electric current from the Maine and New Brunswick Electrical Power Company, to be delivered at Houlton and upon a schedule of rates fixed by the Act. P. & S. L., 1905, c. 249.

Up to this point, the authority of the Houlton Water Company was limited to supplying the town of Houlton and its people with utilities of water, sewerage and electric light.

In the year 1901, the town of Houlton was authorized to purchase the capital stock of the Houlton Water Company, and to elect three water commissioners who "shall have general charge and control of the town's water system." P. & S. L., 1901, c. 464. This was done, and since that time the corporation has been controlled and managed by representatives of

the town. When this change took effect, the Company was engaged solely in furnishing a water supply. There has been no legislation which, in terms, created the corporation as quasi-municipal; none which designates a territory and its inhabitants as constituting the corporation; none which makes the town of Houlton or the property of its citizens liable for its debts. All issues of bonds by the corporation constitute a debt of the Company, and its property only may be mortgaged as security. It is expressly provided that bonds not exceeding $200,000 may be purchased and held by savings banks of Maine. P. & S. L., 1937, c. 14, §2. Such authorization would be unnecessary if these securities were within the category of municipal or quasi-municipal bonds. R. S., 1930, c. 57, §27, IV. The town does not own the physical property of the corporation but only the equity therein, as represented by the capital stock. There appears to be a designed purpose, whether successful or not, to exclude the indebtedness of the Company from the municipal indebtedness of Houlton and the consequent effect upon the constitutional debt limit of the town.

Notwithstanding all this, if the Company were engaged only in supplying water, sewerage and electricity to Houlton, we should be constrained to hold that, in such public utility services, the Company must be regarded as a public municipal corporation because it is supplying services for the necessities and convenience of the municipality and is managed and controlled by that municipality.

The question here presented, however, contains further elements which require consideration. The various amendatory acts have sedulously continued in the corporate structure the attributes associated with private enterprise. By such amendments finally combined in P. & S. L., 1937, c. 14, the Houlton Water Company is now authorized to transmit and distribute electricity in the towns and villages of Linneus, Hodgdon, New Limerick, Ludlow, Smyrna, Merrill, Dyer Brook, Oakfield, Amity, Orient and in Cary and Hammond Plantations, which

cover an area ranging in different directions from 5 to 25 miles from the town of Houlton, and as to which the town itself has never been granted by express legislation any municipal authority or functions.

No right, duty or burden rests by legislative enactment upon the town of Houlton to supply this surrounding district. It does not appear that such extension of authority to a large area of outlying territory is for the public convenience and necessity of the inhabitants of the town of Houlton, but instead solely for the joint advantage of the Houlton Water Company and the users of electricity in the designated territory. There is nothing which indicates that the purpose was to afford a market for surplus electric current and power. There is no provision in any of the legislation for turning over to the town of Houlton any surplus of earnings obtained through the extended service and not needed for the corporate purposes of the Houlton Water Company.

It is true that, by the 1937 Act above referred to, the affairs of the corporation were more specifically and directly placed under the control of the town of Houlton. The Act provides that there shall be a Board of Directors of six members.

> "who shall be citizens and freeholders of the town of Houlton, but who need not be stockholders of said corporation, and who shall be elected by majority vote at the annual town meeting of said town of Houlton."

It was also provided that this Act should not become operative until ratified by the qualified voters of the town of Houlton, and it is admitted that ratification was effected.

The primary objects to be accomplished by a municipal corporation are to promote the welfare and public interest of its inhabitants and not the promotion of the interests of those residing outside its corporate boundaries. It is said in *Taylor* v. *Dimmitt*, 336 Mo., 330, 78 S. W., (2d), 841, 98 A. L. R., 995 at 998:

"In rendering electric service to consumers outside their corporate boundaries, they perform no municipal function, but depart from the primary objects for which they have existence, and enter a field of private business. Authority for such action, we think should clearly appear."

Our Court in *Laughlin* v. *Portland,* 111 Me., 486 at 498, 90 A., 318, 323, 51 L. R. A. N. S., 1143, Ann. Cas., 1916 C, 734, adopts the definition of a public use, laid down by Judge Cooley in his work on Constitutional Limitations, 6th ed. p. 655, viz.:

"That only can be considered a public use where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which on account of their peculiar character and the difficulty —perhaps impossibility—of making provisions for them otherwise, is alike proper, useful and needful for the government to provide."

In *Camden* v. *Village Corporation,* 77 Me., 530 at 535-6, 1 A., 689, 691, we find the following:

"No exemption law is needed for any public property, held as such." *Directors of Poor* v. *School Directors,* 42 Penn. St., 25.

To entitle it to exemption, however, it must be public in its nature. There is a distinction between property held and owned for profit by a municipal corporation like a private individual, charged with no public trust or use, which is private in its nature, and that which it holds in general or special trust for purposes germane to the objects of the corporation. In the former case it is the legitimate subject of taxation, and no reason exists why it should be exempt from the general rule; while in the latter case, such property, forming a part of the means and instrumentalities of the corporation called into use in

the administration of government, is held to be exempt upon principle as well as upon authority."

Judge Dillon in his work on Municipal Corporations, 5th ed., Vol. III, §1293, p. 2102, lays down the following rule:

"But when the city goes beyond the city limits, the purpose must be primarily for the benefit, use, or convenience of the city as distinguished from that of the public outside of it, although they may be incidentally benefited, and the work must be of such a character as to show plainly the predominance of that purpose; and the thing to be done must be within the ordinary or proper range of municipal action. If the enterprise is of such a character that it may justly be described as indicating an underlying purpose different from the city's use and convenience, and creates in the impartial mind a conviction that the use and benefit of the city are but pretexts disguising some foreign and ulterior end, the attributes of a city purpose must be denied to it."

We are not unmindful of the fact that the rule of strict construction as to municipal grants of power has been modified in more recent cases in some jurisdictions, but only to the extent of holding that a municipal corporation, authorized by law to engage in the business of furnishing utility services to its inhabitants, may sell a *surplus*, necessarily acquired, to persons residing outside the municipality, but subject to the prior right of the inhabitants in case of shortage. In such cases, it is frequently pointed out by the courts that, in so disposing of surplus electric current, the municipalities are acting in their proprietary or business capacity, and when so acting should have the same rights and be subject to the same liabilities as private corporations or individuals. 38 Am. Jur., Municipal Corporations, §570, and cases cited. The instant case does not present any such factual situation.

The case of *Whiting* v. *Lubec*, 121 Me., 121, 115 A., 896, has been cited by the defendant as decisive of the present issue. In that case, the town of Lubec was authorized by a legislative enactment to furnish light and water for public and private use by the town and its own citizens. To supply this need, it purchased a water power in the town of Whiting for the purpose of generating electricity. Poles and transmission lines were constructed from Whiting to Lubec. The Court held that such poles and lines were exempt because they were owned by Lubec for its own municipal purposes. That town was not engaged in the enterprise of furnishing electricity to Whiting. The distinction is clear. The property was not taxable because it came within the express exemption of the statute.

We, therefore, conclude that, by legislative action and intendment, the corporate entity of the Houlton Water Company has been continued and maintained separate and distinct from the town of Houlton; that the corporation has been endowed with authority to act in a dual capacity, one as a public municipal corporation so far as the town of Houlton and its inhabitants are concerned, and the other as a private enterprise in furnishing electric current to a dozen other towns and their inhabitants for their convenience and for its private gain. The duties, powers, rights and immunities of the municipality of Houlton have not been extended by legislative grant beyond its own boundaries. It has been given no right to assume any municipal function as to outside territory. There is no reason, under the circumstances of this case, why the Houlton Water Company should be exempt from taxation upon its property, used solely in the transmission and distribution of electricity outside the limits of the town of Houlton.

Judgment for the plaintiff for $200 with interest from December 1, 1940 and with costs.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY

vs.

KENNEBEC WATER DISTRICT

Kennebec. Opinion, December 3, 1943.

Negligence. Res Ipsa Loquiter.

The gist of *res ipsa loquiter* is that the unexplained accident under the particular circumstances warrants an inference of negligence. But this inference may be rebutted by establishment by the defendant that he did his full duty under the circumstances to guard against it.

The rule does not apply if the accident was caused by a defect in an instrumentality not discoverable on reasonable inspection and for which defect the defendant was not responsible, even though such instrumentality may have been in use by the defendant and under its control.

In the instant case there was no evidence to warrant the inference of negligence.

ON EXCEPTIONS.

Action on the case to recover damages caused by the alleged negligence of the defendant. A water meter installed in the plaintiff's store by the defendant broke and the escaping water damaged the plaintiff's stock of merchandise. The evidence did not show what caused the break. The plaintiff relied on the doctrine of *res ipsa loquiter*. Judgment in the lower court was for the plaintiff. The defendant excepted. Exceptions sustained. The case fully appears in the opinion.

Locke, Campbell & Reid, for the plaintiff.

Harvey D. Eaton, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. This action on the case to recover damages caused by the alleged negligence of the defendant was heard by the presiding justice with the right of exceptions reserved. He ordered the entry of judgment for the plaintiff in the sum of $1,828.15 and the case is before us on the defendant's exceptions. The claim is that there is not sufficient evidence to support the finding.

The plaintiff operated a grocery store in the City of Waterville. The defendant supplied water service to the plaintiff. To measure the water used, the defendant on November 22, 1938, approximately two years and a half prior to the accident here in question, installed a meter on the defendant's premises. The meter was made by the Hersey Manufacturing Company, a concern of the highest standing, and had been rebuilt by the manufacturer just prior to the installation. It was supposed to pass the same tests as to pressure as a new meter. It had what is known as a frost proof bottom which was designed to let go when the pressure within reached a certain point. The purpose was to prevent damage to the working parts of the mechanism, if the pressure within became too great because of freezing. It is conceded that the normal water pressure maintained by the defendant throughout the area where the plaintiff's store was located was slightly in excess of one hundred pounds to the square inch, and the evidence establishes that the meter in question was designed to withstand a pressure of at least six hundred pounds before the bottom would let go. About midnight on Saturday, May 17, 1941, the plaintiff's store manager inspected the cellar of the store and read the meter which was located there. Everything seemed to be in a satisfactory condition. The next afternoon, Sunday, between two and four o'clock he entered the store and found a large amount of water in the cellar, which had done extensive damage to the stock of merchandise. Investigation showed that the bottom of the meter had come off. Certainly no frost caused the break; and

we are left with but two explanations for what happened,—either there was an excess pressure or else the meter was defective. There is, however, in the evidence nothing to show anything but the normal pressure in the defendant's system, and if there was in the store any excess pressure built up by what is known as hammer, it was due to the sudden closing of automatic shut-offs which were installed by the plaintiff. We are as a matter of fact faced with an accident for which there is no adequate explanation.

There is a suggestion by the plaintiff that the defendant should have known that shut-offs of this nature were commonly in use and should not have installed a meter which would let go on building up such a pressure. But there is nothing whatever in the evidence to show any negligence on the part of the defendant in failing to anticipate such an eventuality; and in any event it is only conjecture that it was excess pressure due to hammer which caused the accident. The plaintiff, therefore, really rests its claimed right of recovery on the doctrine of *res ipsa loquiter*. The plaintiff argues that the following statement of the doctrine from *Chicago Union Traction Co.* v. *Giese,* 229 Ill., 260, 82 N. E., 232, cited with approval in the recent case of *Nichols* v. *Kobritz,* 139 Me., 258, 29 A. (2d), 161, warrants a recovery in this case:

> "When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care."

The rule has been applied in this jurisdiction to cases where automobiles suddenly and without explanation have left the highway. *Chaisson* v. *Williams,* 130 Me., 341, 156 A., 154;

Shea v. *Hern*, 132 Me., 361, 171 A., 248; *Sylvia* v. *Etscovitz*, 135 Me., 80, 189 A., 419. The gist of the doctrine is that the unexplained accident under the particular circumstances warrants an inference of negligence. But this inference may be rebutted. The defendant by showing how the accident happened may establish that it was not due to his fault. Shearman and Redfield on Negligence, Rev. Ed., pages 154-155. It is not necessary, however, for the defendant to go that far. He need not show how the accident happened, if without doing so he can establish that he did his full duty under the circumstances to guard against it. *Klein* v. *Fraser*, 155 N. Y. Supp. 848, 169 App. Div., 812; *Baran* v. *Reading Iron Co.*, 202 Pa., 274, 51 A., 979; Shearman and Redfield on Negligence, *supra*. It has accordingly been held that the rule does not apply if the accident was caused by a defect in an instrumentality not discoverable on reasonable inspection and for which fault the defendant was not responsible, even though such instrumentality may have been in use by a defendant and under its control. *Cederberg* v. *Minneapolis, St. Paul & S. Ste. M. R'y Co.*, 101 Minn., 100, 111 N. W., 953, (fracture in cross head and piston rod of a locomotive); *Memphis Street R'y Co.* v. *Stockton*, 143 Tenn., 201, 226 S. W., 187, 22 A. L. A., 1467, (defect in an air brake); *Fitzmaurice* v. *Boston, Revere Beach & Lynn R'd Co.*, 256 Mass., 217, 152 N. E., 239, (break in axle of a railway car).

In the instant case the meter was of an approved design and bought from a reputable manufacturer. No amount of inspection by the defendant would have shown any defect, for it was impossible to find any flaw even after the appliance had been dismantled. Any inference of negligence of the defendant which may have arisen because of the mere happening of the accident has been effectively rebutted. To hold otherwise would be to make the defendant an insurer regardless of negligence. The case is quite different from *Leighton* v. *Dean*, 117 Me., 40, 102 A., 565, L. R. A., 1918 B, 922. In that case to use the language of the court page 44: "The very circumstances of this

accident seem to establish the plaintiff's case that the awning was insecure and that the defendant failed to use proper care to make it reasonably safe." Although the issue of liability must be governed by the facts of each particular case, there is an analogy between this case and *Edwards* v. *Cumberland County Power & Light Co.*, 128 Me., 207, 146 A., 700, which involved the escape of electricity due as was claimed to a defective appliance. The court there said, page 217: "The inference of negligence that makes out a *prima facie* case is of no avail to a plaintiff and will not maintain a verdict in his behalf, when defendant has shown that its appliances were of standard pattern and approved design for construction of its type."

There being no evidence to warrant the inference of negligence, the ruling below was legal error.

Exceptions sustained.

CHESTER T. ELLMS, TRUSTEE IN EQUITY

vs.

EARL ELLMS, ET ALS.

Penobscot. Opinion, January 12, 1944.

Wills. Trusts.

The intent of a testator is not to be thwarted unless some positive rule or canon of construction makes it necessary.

Where no intention to the contrary appears, the language used in creating an estate in a trustee will be limited to the purposes of its creation. When they are satisfied the estate of the trustee ceases to exist and his title becomes extinct.

The general principle which regulates the quantum of estate taken by the trustee of an active trust is that he takes, irrespective of the estate which the instrument purports to convey, exactly that quantity of interest in the estate which the purposes of the trust require, the construction in this respect being governed mainly by the intention of the donor as gathered from the general scope of the instrument.

The intent of the parties is determined by the scope and intent of the trust.

In the instant case, there was created in the trustee a legal estate in the property of the testator to hold during the lifetime of the testator's widow, with a restricted and limited power of use of income and principal for the sole benefit of said widow and to supply her needs during her lifetime.

There was no express or implied intention on the part of the testator to make an outright gift of income for the benefit of his widow or to make any part of the unexpended balance of income a part of her estate at her decease. Any such unexpended balance of income remained as a part of the estate of the testator upon the decease of his widow and was disposed of by the residuary clause of his will.

ON APPEAL.

Proceedings for the construction and interpretation of the will of Charles Ellms. Under the will, the testator's entire estate was given in trust to Chester T. Ellms to be used for the

sole benefit of testator's wife during her lifetime. It further provided for certain bequests and the disposal of the residue of the estate after the execution of the trust. Certain of the defendants claimed that all of the property of the testator was devised and bequeathed to the trustee, and that testator's widow thereby received the entire equitable fee in her husband's estate and that a limitation-over after an indefinite gift with power of disposal was invalid and a gift-over after a fee was void. The presiding Justice of the Superior Court ruled that it was not the intent of the testator to make an outright gift of either income or unexpended balance a part of the widow's estate at the time of her death. The defendants who alleged an interest in the widow's estate appealed. Appeal dismissed. The case fully appears in the opinion.

B. W. Blanchard, for the plaintiff.

Edgar M. Simpson, for defendant Bertha Ellms.

Percy A. Hasty, for defendants Almon Ellms, Lena Hutchinson, Eugene Mitchell, Guy O. Ellms, Alonzo L. Ellms, Erma Bailey, Charles Ellms, Gertrude Crawford, Bernice Bowdoin, Earl Ellms and Ruth Smith.

Jules Angoff of Boston, for defendants Jules E. Angoff as Administrator of the Estate of Mary E. Ellms, intervening.

Bernstein & Bernstein, for defendants Ida A. Gilman, Eva B. Maguire and Jules E. Angoff as Administrator of the Estate of Mary E. Ellms.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This is an appeal by the administrator of the Estate of Mary E. Ellms and two individual defendants, from a decree of the presiding Justice of the Superior Court in equity.

The proceedings relate to the construction and interpretation of the will of Charles Ellms. While other questions were raised, the issue is now confined to the correctness of the ruling of the presiding Justice with relation to a trust provision in the will for the benefit of the widow of the testator. The provision is as follows:

> "FIRST: I give, bequeath and devise to Chester T. Ellms, all and singular whatever of property I may die possessed of, to have and hold nevertheless in trust, as trustee thereof, for the use and purposes and for the sole benefit of my beloved wife, Mary E. Ellms, to the end that she shall be well and properly treated and cared for during her life and shall be in all respects provided for as I have myself done thus far; and I direct said trustee, or his successor in case of his death and the appointment of one before the execution of this trust, to exercise full and complete authority over said property and to carefully guard the interest of my said wife that no harm shall come to her, and see that proper and kind treatment be always bestowed on her and her needs suitably supplied."

The will then provided certain money bequests followed by a residuary clause to named individuals, practically all of whom were the testator's own blood relatives. These bequests were all subject to the proviso that they were not to be paid until after the proper execution of the trust.

The surrounding facts and circumstances of the parties were agreed upon by stipulation. Mary E. Ellms, the wife of the testator, was insane and had been a patient at a State institution for a period of 8 years preceding the execution of her husband's will, which was made May 19, 1908. At the time of his death in 1919, she was still in the State hospital and remained there until her own death 20 years later in 1939. The principal contention raised by the appellants is that all the property of the testator was devised and bequeathed to a

trustee, and the widow thereby received the entire equitable fee in her husband's estate; that a limitation-over after an indefinite gift with the power of disposal is invalid; and a gift-over after a fee is void for repugnancy.

Subsidiary issues were that the widow, if she had only a life estate, had a vested interest to the entire income and any unexpended income should go to her estate.

Again, if the widow did not have a vested interest in the entire income, then the accumulated income should be distributed as intestate property.

The findings of the presiding Justice upon which the decree was based, disposed of the issues thus raised as follows:

> "At the time of the execution of the will the testator's wife had been in the State Hospital eight years. He had been taking care of and providing for her all of that time and he wanted her provided for 'and shall be in all respects provided for as I have myself done thus far,' and he desired the Trustee to 'carefully guard the interest of my said wife that no harm shall come to her and see that proper and kind treatment be always bestowed on her and her needs suitably supplied.'
>
> He left the estate in trust 'for the use and purposes and for the sole benefit of my beloved wife, Mary E. Ellms, to the end that she shall be well and properly treated and cared for during her life.' He did not know how much or how little of his estate would be necessary for her care, but no matter how much or how little, he wanted it used to carry out that purpose. After her care was provided for at the termination of the trust, if anything was left, it could be used for the subordinate purposes, namely: the bequests and the residuary.
>
> It seems plain to this Court that this testator intended that this estate should be used,—income, the whole or any

part of it; corpus, the whole or any part of it,—for the support of his wife; if anything was left that was secondary—to go to others.

The next question is, is this real intention so far in conflict with some positive rule of law that it cannot be carried into execution. The Court discovers no conflict. We hold that this trust terminated at the death of Mary E. Ellms; we hold further that the Trustee had the duty of taking care of the said Mary E. Ellms in the manner desired by the testator, as expressed in his will, and in order to carry out this purpose he was to use as much of the estate, either income or principal, as was necessary. On the other hand, if all of the income was not used for this purpose it was not to become the property of Mary E. Ellms but become part of the testator's estate and would go to the legatees or be disposed of under the residuary clause."

As stated by the presiding Justice, the actual intent of the testator is clear. It is not to be thwarted unless some positive rule or canon of construction makes it necessary. Such rules provide tests, more or less artificial, but designed to determine contruction. *Singhi* v. *Dean,* 119 Me., 287, 110 A., 865. All such rules were established by courts only for the purpose of effectuating such construction. Caution is sometimes necessary to prevent perversion of a testator's intention by an astute application of cases and so-called precedents, for in the matter of interpretation of wills, as Justice Whitehouse said in *Wentworth* v. *Fernald,* 92 Me., 282, 42 A., 550, 552:

"The analogies afforded by precedents are helpful servants, but dangerous masters."

The contention of the appellants finds its chief reliance upon the emphasis that all the property was to be held by the trustee

"for the use and purposes and for the sole benefit of my beloved wife." It ignores the immediately following provision in the same sentence, which reads, "*to the end* that she shall be well and properly treated and cared for *during her life* (italics ours) and shall be in all respects provided for as I have myself done thus far."

Still continuing, in the same paragraph, and without pause, comes the further authoritative mandate to the trustee "to exercise full and complete authority over said property and to carefully guard the interest of my said wife that no harm shall come to her, and see that proper and kind treatment be always bestowed on her and her needs suitably supplied."

The trustee's authority was confined to, centered upon and limited by the provisions for the physical needs, the comforts and attention to the unfortunate demented wife of the testator. For eight years at the date of his will, she had been in this condition. She remained so during the twelve years he lived thereafter. He made it certain that her wants and hers alone were to be well cared for after his decease, as he had done for the twenty years preceding. For the next score of years that she survived her husband, such obligation rested on the trustee. That encompassed the scope of his authority. Her needs ended with her death. His trust likewise ended.

Speaking of the estate granted to a trustee, the Court, in *Young* v. *Bradley*, 101 U. S., 782, says, 25 L.Ed. 1044,

> "This subject is considered and the authorities fully reviewed by Mr. Justice Swayne, in *Doe, Lessee of Poor* v. *Considine*, 6 Wall, 458, 18 L.Ed. 869, 'It is well settled,' says he, 'that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation.' "

Our own Court adopted the clear definition given in 1 Perry on Trusts, Sec. 312, in *Slade v. Patten*, 68 Me., 380, as follows:

> "The intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts; first, when a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him or his heirs or not; and, second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust requires."

The general principle which regulates the quantum of estate taken by the trustee of an active trust, is that he takes, irrespective of the estate which the instrument purports to convey, exactly that quantity of interest in the estate which the purposes of the trust require,—the construction in this respect being governed mainly by the intention of the donor as gathered from the general scope of the instrument; but the trustee will never by construction be held to take a greater estate than the nature of the trust demands. 26 R. C. L. Trusts, Sec. 107.

There was created in the trustee a legal estate in the property of the testator to hold during the lifetime of the widow, with a restricted and limited power to use of income and principle for the sole benefit of said widow, and to supply her needs during her lifetime. While it is arguable that the testator anticipated that his widow would require the entire income of his estate for her support, we find no express or implied intention on his part to make an outright gift of income for her benefit

or to make any part of the unexpended balance of income a part of her estate at her decease. As the presiding Justice, in expressive phrase, said:

> "It seems plain to this Court that this testator intended that this estate should be used,—income, the whole or any part of it; corpus, the whole or any part of it, for the support of his wife; if anything was left that was secondary—to go to others."

It seems unnecessary to multiply citations in a case of this character, but of interest in connection with the issues involved we make reference to *Barry* v. *Austin*, 118 Me., 51, 105 A., 806; *Reed* v. *Creamer*, 118 Me., 317, 108 A., 82; *Smith* v. *Walker*, 118 Me., 473, 109 A., 10; *Bunker* v. *Bunker*, 130 Me., 103, 154 A., 73; *In re Robinson's Will*, 101 Vt., 464, 144 A., 457 and 75 A. L. R., 59 with annotations beginning on p. 71.

We find no error in the rulings and decree of the presiding Justice.

Appeal Dismissed.

LEVITE T. THIBODEAU *vs.* FRANK MARTIN.

Aroostook. Opinion, January 12, 1944.

Bankruptcy. Assault and Battery.

In the Bankruptcy Act, July 1, 1898, Chapter 541, Section 17 (2), 30 Stat., 550, which excepts liabilities for wilful and malicious injuries to the person or property of another from the provable debts from which a bankrupt is released by a discharge, wilful means nothing more than intentional and the malice necessary to bring a liability within the exception need only be that which the law implies in the intentional doing of a wrongful act to the injury of another without just cause or excuse.

There cannot be an assault and battery without the intentional doing of a wrongful act and, when, as in the instant case, actual and substantial injuries result and justification is lacking, a judgment for the liability which arises is within the exception and is not released by a discharge in bankruptcy.

In determining whether a judgment rendered in an action for assault and battery was released by the judgment debtor's discharge in bankruptcy, it was not error for the trial judge to rely on the record of the assault and battery case and not examine the evidence, as there was no ambiguity as to the cause of action nor doubt as to the issue necessarily involved there and actually decided. On that issue the judgment was conclusive.

The judgment in the assault and battery action was not taken out of the exception in Section 17 (2) of the Bankruptcy Act because the jury failed to award exemplary damages in that suit.

Under the strict rules of pleading a replication should have been filed after the defendant pleaded his discharge in bankruptcy, but, on the record, the failure to file a replication not only must be treated as waived at the trial, but, having been objected to for the first time on this review, could not be deemed a ground of error.

ON EXCEPTIONS.

Action of debt on a judgment awarding damages to the plaintiff in an action for assault and battery against the defendant. In the assault and battery action a general verdict for

substantial compensatory damages was returned and judgment entered on the verdict and execution issued. In this suit on the judgment, upon the record of the assault and battery case, not including the evidence, but supplemented by a certificate of the debtor's discharge in bankruptcy, the trial judge ruled that the judgment was not released by the discharge, and gave judgment for the plaintiff. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

John O. Rogers,

Arthur J. Nadeau, for the plaintiff.

W. P. Hamilton, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. In this action of debt on a judgment, although a plea of the general issue with a brief statement alleging a discharge in bankruptcy was filed, a recovery was allowed and exceptions were reserved.

In the case in which the judgment was rendered the declaration alleged an assault and battery in which the defendant threw the plaintiff upon the ground and there struck and kicked him inflicting serious bodily injuries which the defendant by his plea denied but did not justify. A general verdict for substantial compensatory damages was returned, judgment was entered on the verdict and execution issued. The defendant then went into bankruptcy and received his discharge. In this suit on the judgment, upon the record of the assault and battery case, not including the evidence but supplemented by a certificate of the debtor's discharge in bankruptcy, the trial judge, sitting without a jury, ruled that the judgment was not released by the discharge and no other defense being offered the creditor was entitled to prevail. In this there was no error.

Liabilities for wilful and malicious injuries to the person or

property of another are excepted from the provable debts from which a bankrupt is released by a discharge. Bankruptcy Act July 1, 1898, c. 541 § 17 (2), 30 Stat., 550; 11 U. S. C. A., § 35 (2). Wilful as used in the statute means nothing more than intentional and the malice necessary to bring a liability within the exception need only be that which the law implies in the intentional doing of a wrongful act to the injury of another without just cause or excuse. Actual ill will or malevolence is not necessarily involved and proof of special or actual malice is not required. *Tinker* v. *Colwell*, 193 U. S., 473, 24 S. Ct., 505, 48 Law. Ed., 754; *Peters* v. *U. S.*, 177 Fed., 885; *Rogers* v. *Doody*, 119 Conn., 532, 178 A., 51; *McChristal* v. *Clisbee*, 190 Mass., 120, 76 N. E., 511, 3 L. R. A. N. S., 702, 5 Ann. Cas., 769; *Nunn* v. *Drieborg*, 235 Mich., 383, 209 N. W., 89; *In re Deveraux*, 269 N. Y. S., 127, 150 Misc., 3371.

There cannot be an assault and battery without the intentional doing of a wrongful act and when, as here, actual and substantial injuries result and justification is lacking, by the clear weight of authority a judgment for the liability which arises is for a wilful and malicious injury to the person of another which is not released by a discharge in bankruptcy. *In re Conroy*, 237 Fed., 817; *In re Pacer*, 5 F. Supp., 439; *Peters* v. *U. S.*, 177 Fed., 885; *In re Wernecke*, 1 F. Supp., 127; *McChristal v. Clisbee*, 190 Mass., 120, 76 N. E., 511; *Gorczyca* v. *Stanoch*, 308 Ill., App., 235, 31 N. E. (2d), 403; *Tytar* v. *Horbal*, 274 Mich., 634, 265 N. W., 762; *Taylor* v. *Buser*, 167 N. Y. S., 887; *Remington on Bankruptcy*, § 3551; 4 *Am. Jur.*, 191.

In deciding whether the judgment in this case was released by the debtor's discharge in bankruptcy it was not error for the trial judge to rely on the record presented and not examine the evidence in the original action. The precise and only issue there was whether the bankrupt had committed the assault and battery alleged. There was no ambiguity as to the cause of action nor doubt as to the issue necessarily involved and actually decided. On that issue the judgment was conclusive. *Peters* v.

U. S., supra; *McChristal* v. *Clisbee*, supra; see *Davis* v. *Davis*, 61 Me., 395, 398; *Walker* v. *Chase*, 53 Me., 258.

Nor was the decision below contrary to law because the jury, in the assault and battery case on which the judgment was based, failed to award exemplary damages. As already pointed out the exception in Section 17 (2) of the Bankruptcy Act includes a judgment for an assault and battery which is wilful and malicious within the accepted meaning of that provision and it is not confined to acts which would justify exemplary damages. *In re Franks*, 49 F. (2d), 389; *In re Wernecke*, supra. The decision *In re De Lauro*, 1 F. Supp., 678, cited on the brief, is not in point and the facts and reasons advanced to support it have no counterparts here.

The judgment debtor takes nothing by the error in pleading of which he complains. Undoubtedly the strict rule of pleading required that a replication be filed after the defendant had pleaded his discharge in bankruptcy. *Kellog* v. *Kimball*, 135 Mass., 125. But on this record that irregularity not only must be treated as waived at the trial but having been objected to for the first time on this review cannot be deemed a ground of error. 18 *Encyc. Pl. & Pr.*, 650; 4 C. J. S., p. 528 n. 23, Sec. 272.

The exceptions presented must be overruled. So ordered.

Exceptions overruled.

ROUJINA MANSOUR ROUKOS, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE IN RE ESTATE OF MANSOUR JOHN ROUKOS.

Kennebec. Opinion, January 14, 1944.

Waiver to Provisions of Will by surviving spouse; Partition of Real Estate; Decrees of Probate Courts; Collateral Attack on Judgment.

By waiver of the provisions of a will a widow takes the same share in the real estate of her deceased husband as is provided by law in intestate estates, viz: a one half interest in the real estate when kindred but no issue, subject to the payments of debts; but, in any event, a one-third interest from payment of debts.

A sale of all of the real estate must be made subject to the widow's one-third interest.

After the sale of the real estate under license of the Judge of Probate, the widow, appellant herein, retained title to a one-third interest and there was no such dispute as to title as to deprive the Judge of Probate of jurisdiction to grant a petition for partition. To deprive the Probate Court of jurisdiction to make partition of land there must be a real doubt, an uncertainty as to the rights of the respective parties. It is not enough that assertion be made that there is a dispute, nor even that the parties are not in agreement as to their rights. There must be that uncertainty as to the facts or law that warrants submission to a jury or other legal tribunal for decision.

The record in the instant case shows that the decision of the Supreme Court of Probate was rendered and filed during the vacation following the term in which the matter was heard and therefore was not faulty as regards the time in which it was filed.

The claim of the appellant that upon the petition for license to sell the real estate it was not necessary, right or proper to sell all of the estate in order to pay the debts of the estate, made in this proceeding is in the nature of a collateral attack upon a decree in a previous proceeding and could not be maintained for the reason that the Judge of Probate was acting within his jurisdiction in making the decree which licensed the sale as made. The question as to whether the circumstances attending the former proceeding were

such as to warrant vacating the decree upon direct attack was not before the Law Court and therefore not affected by the ruling of the Court.

The rule which prevails upon sale on execution to the effect that not more than one equity can be sold for one price does not apply in a proceeding such as in the instant case. There being no right of redemption to the heir, devisee or widow, there is no reason for the application of such a rule.

ON EXCEPTIONS.

A petition for partition by the purchasers of a two-thirds undivided interest in the real estate of Mansour John Roukos, deceased. The executor of the will of said deceased, previous to the proceeding herein, had presented to the Probate Court a petition alleging that the personal estate was insufficient to pay the debts of the deceased, funeral expenses, legacies and expenses of administration and that it was necessary to sell real estate, and asking for license to sell all of the real estate. The petition was granted and sale made to the petitioners in this action of two-thirds, undivided, of the real estate of the deceased testator. No appeal was taken from the decree. In the instant case the purchasers of the two-thirds interest brought petition in the Probate Court for partition of the real estate. The widow, appellant in this proceeding, who had waived the provisions of the will, appearing in opposition, claimed a one-half interest in the properties and that the license and sale under which the petitioners claimed was invalid. The Probate Court granted the petition of the purchasers and appointed Commissioners to make the sale. The widow appealed to the Supreme Court of Probate. The Judge of the Superior Court sitting therein affrmed the decree of the Probate Court. The widow, appellant herein, filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Gordon F. Gallant,

Harvey D. Eaton, for the appellant.

Alfred A. Matthieu,

William H. Niehoff, for appellees.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The above cause comes to this Court upon exceptions to the decree of a Justice of the Superior Court, sitting as the Supreme Court of Probate, confirming a decree of the Probate Court for the County of Kennebec, taken to the Supreme Court of Probate upon appeal.

Mansour Hanna Roukos, otherwise known as Mansour John Roukos, died February 3, 1940, testate, leaving a widow, the appellant in this action, and a brother and sister. Upon the will being probated, the widow waived the provisions thereof and by reason of such waiver took the same share in the real estate of her deceased husband as is provided by law in intestate estates. R. S. 1930, Chap. 89, Secs. 13, 14.

By Sec. 1, I of the same chapter, a widow of a person deceased intestate, leaving kindred but no issue, takes one-half interest in the real estate, subject to the payment of debts; but, in any event, one-third interest, free from payment of debts.

The inventory of the estate disclosed two parcels of real estate, one of which parcels was appraised at $6,300, subject to a mortgage of $600, and the second of which parcels was appraised at $3,000, subject to a mortgage of $1,100, making a total equity of the real estate of $7,600. The executor of the estate presented to the Probate Court, under the provisions of R. S. 85, Sec. 1, I, a petition alleging that the personal estate was insufficient to pay the debts of the deceased's funeral expenses, legacies and expenses of sale and of administration and for the erection of a suitable marker or gravestone, and that it was therefore necessary to sell some part of the real estate; and further, that the residue would be greatly depreciated by a sale of any portion thereof, and it was asked that license issue to make sale of the whole of the said real estate for the payment of the debts, funeral charges, legacies and expenses of sale and of administration and for the erection of a suitable marker or gravestone. The petition stated that the debts of the

estate amounted to $352.50, and that the expenses of sale and administration would amount to $600., a total of $952.50. It further stated that the value of the personal estate was $67.16. The petition was granted and a license issued for the sale of all of the real estate as prayed for. Sale was made to Nimon Rokos Heed and Mary Rokos Heed, the petitioners in this action, and certificate of sale of two-thirds, undivided, of the real estate of the deceased testator for the sum of $2,800. was returned into the Probate Court. No appeal was taken from the decree. Subsequently the purchasers of the two-thirds interest brought petition in the Probate Court for partition of the said properties. The widow, appearing in opposition, claimed that there was a dispute as to the proportions; that she owned one-half interest instead of one-third interest, as alleged in the petition, and that the license and sale under which the petitioners claimed interest were invalid.

The Probate Court granted the petition and appointed commissioners to make the partition. The respondent appealed to the Supreme Court of Probate. The Justice of the Superior Court, sitting therein, affirmed the decree of the Probate Court, to which decision the respondent excepted and comes to this Court.

The exceptions set forth that the decision of the Justice in the Supreme Court of Probate was erroneous in four respects:

> "FIRST: This appeal was heard at the April term of the Supreme Court of Probate in Kennebec County which term finally adjourned April 23, 1943 but the decision in this case was not filed until May 28, 1943."

The appellant has not pressed this reason for exception and may be considered to have waived the same. However, inasmuch as a decision of a Superior Court Justice, after hearing had, not rendered within the time prescribed by law, would be void we feel it proper to say that the record shows that the decision was rendered and filed during the vacation following the

term in which the matter was heard, and therefore is not faulty as regards the time in which it was filed.

> SECOND: She says that her share was an undivided half and that there is a vigorous and active dispute in regard to the title, i.e. as to the amount of her interest."

R. S. Chap. 78, Sec. 1, provides that the Court of Probate may make partition "when the proportions of the respective parties are not in dispute between them, . . . or upon other questions that he thinks proper for the consideration of a jury and a court of common law."

The statute above referred to, Chap. 89, Sec. 1, I, as defining the widow's right of descent in the real estate of a deceased husband leaving kindred, but no issue, provides that she shall be entitled to one-half interest; but this provision is qualified by the clause, "being subject to the payment of debts," and the closing sentence, "In any event, one-third shall descend to the widow or widower free from payment of debts." It follows that a sale of all of the real estate must be made subject to her one-third interest. *Longley* v. *Longley*, 92 Me., 395, 398, 42 A., 798. To deprive the Probate Court of jurisdiction to act, there must be a real doubt, an uncertainty as to the rights of the respective parties. It is not enough that assertion be made that there is a dispute nor even that the parties are not in agreement as to their rights. There must be that uncertainty as to facts or law that warrants submission to a jury or other legal tribunal for decision. *Dearborn* v. *Preston*, 89 Mass., 192; *Earl* v. *Rowe*, 35 Me., 414. There was no such dispute or uncertainty as to the title of the respective parties or other issue that prevented the Judge of Probate from taking jurisdiction.

> "THIRD: That it was not necessary, right nor proper to sell two parcels of real estate of the value of nine thousand three hundred dollars ($9,300) with an equity above mortgages of seven thousand six hundred dollars ($7,600)

> for the payment of debts amounting to two hundred eighty-five dollars and thirty-four cents ($285.34)."

This exception is directed to the correctness of a decision of the Judge of Probate in a previous proceeding. It is a collateral attack upon the decree issued therein and cannot prevail if the subject matter and the decree were within the jurisdiction of that tribunal. The allegation in that proceeding invoked the provision of the statute R. S. Chap. 85, Sec. 1, III, which provides that the Judge of Probate may license the sale of the whole of the real estate of a deceased person when it appears by the petition and proof that the residue would be greatly depreciated by a sale of any portion thereof under the provisions of Sec. 1, I of the same statute. The petition duly presented required the Judge to make decision upon the proof submitted, as to the correctness of the allegation and to issue a decree appropriate to his finding. The subject matter and decree were within the jurisdiction of the Judge of Probate. It was not appealed and is not open to attack in this proceeding.

Chief Justice Cornish said in *Thompson, Appellant,* 116 Me., 473, 476, 102 A., 303, 304:

> "It is familiar law that the Probate Court is without common law jurisdiction, and is limited in its powers to those directly conferred by statute and to those necessarily incident to the execution of such powers. But it is equally well settled that its decrees in matters within its jurisdiction and within its statute-given authority are conclusive unless vacated or revoked. Snow v. Russell, 93 Me., 362 - 376."

And in *Tobin* v. *Larkin,* 187 Mass., 279, 282, 72 N. E. 985, 986, Chief Justice Knowlton said:

> "A decree of the Probate Court within its jurisdiction is good unless it is set aside, and it cannot be attacked collaterally."

We base our decision wholly upon the ground that the granting of the license to sell the real estate of the deceased was a matter within the jurisdiction of the Judge of Probate and cannot therefore be attacked in this proceeding. Whether the circumstances under which the license was obtained were such as to warrant the vacating of the decree upon direct attack in appropriate proceedings is a question not before us and is not affected by our ruling.

> "FOURTH: That the two parcels could not be sold for one lump sum to one party by one deed."

It is true that it has been held that when sale is made on execution, more than one equity cannot be sold for one price. This is for the reason that the debtor has the right of redemption from such sale and it is his right to redeem one parcel without redeeming another. If the different parcels are sold for one price he is prevented from redeeming unless he pays the entire price of all the equities.

True v. *Emery*, 67 Me., 28.

Bartlett v. *Stearns*, 73 Me., 17.

Barnes v. *Hechler*, 124 Me., 30, 125 A., 226.

But, upon sale of the real estate for the payment of debts of an estate, no right exists in the heir, devisee or widow to redeem from such sale. Therefore, there is no reason for such a rule. The proceeds of the sale go into the hands of the executor for the payment of debts and other charges and the residue is distributed according to the rights of the beneficiaries. Segregation of the proceeds of the different parcels would serve no purpose.

The Order must be:

Exceptions Overruled.

ORRIN R. BAKER

vs.

MCGARY TRANSPORTATION CO., INC.

Kennebec. Opinion, January 17, 1944.

Automobiles. Contributory Negligence. Due Care.

In the instant case, careless inattention on the part of the plaintiff was a contributory proximate cause of the damages sustained by him; and his failure to sustain the burden of proof that he himself was exercising due care defeated his right to recover.

MOTION FOR NEW TRIAL.

Action for damages for personal injuries and property damage. The plaintiff ran into defendant's trailer, which was standing partly on a state highway. Although it was an hour before sunrise, the lights of the trailer were turned off in violation of law. In the trial court, the plaintiff was awarded damages by jury verdict. The defendant moved for a new trial. Motion sustained. New trial granted, the Court holding that if the plaintiff had been giving due attention he could have avoided the collision. The case fully appears in the opinion.

Ernest Goodspeed,

Charles A. Pierce, for the plaintiff.

Robinson & Richardson,

John D. Leddy,

Locke, Campbell & Reid and Herbert E. Locke, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C. J. In this action the plaintiff was awarded damages for the destruction of his automobile and the injuries he received when he ran into the rear end of the defendant's four wheel trailer. The case comes forward on the defendant's general motion.

When the collision occurred the trailer, operated by an employee of the defendant corporation, was standing at the side, but partly on, a state highway in Topsham and, although it was an hour before sunrise, its lights were turned off in violation of the highway law. *Revised Statutes,* Chap. 29, §82 as amended, §83. The jury were not manifestly wrong in finding that the presumption of negligence which arose was not overcome by the explanations offered.

The trailer was eleven feet high and the body seven feet wide, the bottom of its black and white striped tailboard was four and one-half feet up from the road with two six-inch reflectors hanging down from it, and the rear wheels were large and dual type. The highway at this point was straight, both cars were on about the same gradual up-grade and there was no other traffic. The plaintiff testifies that with windshield clear his headlights showing the road seventy-five feet ahead he drove at thirty to thirty-five miles an hour to within less than ten feet of the trailer before he saw it and then without time to apply his brakes or turn away, crashed into its rear end. His excuse is that he had taped his headlights half way down the lenses to conform to war time dim out regulations and the beams were lowered. By his own admissions, however, when he saw the trailer his lights were high enough to show him its black and white striped tailboard up four and one-half feet from the ground, and he advances no reason for a lessened illumination along the range of his lights.

We are convinced that if the plaintiff had been giving due

attention to his driving and the road ahead he would have seen the trailer in ample time to either slow down and stop or turn to the left into the then unobstructed other lane of the way. On the record his thoughtless inattention was a contributing proximate cause of the damages which he sustained. In principle this case cannot be distinguished from *Callahan* v. *Bridges Sons*, 128 Me., 346, 147 A., 423.

The failure of the plaintiff to sustain the burden of establishing his own due care at the time of the collision defeats his right to recover in this action and the verdict returned must be set aside.

Motion sustained.
New trial granted.

RUTH WAYE

vs.

HAROLD DECOSTER AND IRVING STEVENS.

Androscoggin. Opinion, January 18, 1944.

Authority to Set Aside Verdict.

The statute (R. S., 1930, Chapter 96, Section 60, as amended by Public Laws, 1939, Chapter 60) authorizing a presiding justice to set aside a verdict and grant a new trial gives to the aggrieved party, in place of a choice of one of two tribunals, access to both.

When a presiding justice sustains a motion for a new trial conditionally and the moving party files a second motion in the Supreme Judicial Court, the filing of the second motion is not a waiver of the first motion.

ON EXCEPTIONS.

Plaintiff brought an action for negligence. At the trial the jury returned a verdict for the plaintiff. The defendants filed a motion for a new trial. The presiding justice granted the motion "unless within twenty days" the plaintiff filed a remittitur of three-fifths of the amount awarded as damages by the verdict. Before the twenty days had elapsed, the defendants filed a second motion for a new trial directed to the Supreme Judicial Court. No transcript of the evidence was filed with the Court and the defendants did nothing to complete their second motion. The court dismissed the case because of the defendants' failure to file a transcript of the evidence. The plaintiff thereupon moved in the Superior Court for judgment upon the verdict. Her motion was granted and judgment was ordered for the plaintiff for the full amount of the verdict. To this order the defendants filed exceptions. Exceptions sustained. Case remanded to the Superior Court for a new trial as ordered by the presiding justice of that Court. The case fully appears in the opinion.

John G. Marshall,

Frank W. Linnell, for the plaintiff.

William B. Mahoney, James R. Desmond, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER and MANSER, JJ. dissenting.

CHAPMAN, J. The above cause comes to this Court upon exceptions by the defendants to an order of a Justice of the Superior Court for judgment upon the verdict rendered by a jury empaneled to try the case. A statement of the proceedings previous to the order is necessary for an understanding of the issues raised by the defendants' bill of exceptions.

The plaintiff in her writ claimed damages for negligence of the defendants. At the trial the jury returned a verdict against both defendants and assessed damages in the sum of $2,500. The defendants duly filed a motion directed to the presiding Justice for a new trial upon the usual grounds. It was claimed that the verdict was unjustified under the evidence and that the damages assessed were excessive. This motion was made in accordance with R. S. Chap. 96, Sec. 60, which provides that the presiding Justice may set aside a verdict and grant a new trial if in his opinion the evidence demands it. It is the established law that it is within the authority of the Justice to enter an order unconditionally granting such motion or, if he deems the verdict faulty only by reason of excessive damages, to make an order granting a new trial *unless* the plaintiff shall, within a specified time, file a remittitur of all damages in excess of an amount named in said order.

Section 59 of the chapter referred to provides that a litigant, believing himself aggrieved at a verdict, may file in the Superior Court a motion for a new trial, to be heard and decided by this Court upon the evidence, transcript of which and copy of the record must be furnished by the moving party and filed within such time as the presiding Justice may order. This motion, so entered upon the docket of the Superior Court, is, upon filing of the transcript of the evidence and copy of the record by the movant, certified by the Clerk of that Court to the Clerk of this Court for entry upon the docket of this Court. This Court, upon entry upon its docket of such a motion, accompanied by the transcript of evidence and copy of record, has the same authority as to the grant or denial of a new trial as the Justice of the Superior Court.

Thus, previous to the enactment of Chap. 66 of the Public Laws of 1939, amendatory of R. S. Chap. 96, Sec. 60, a litigant aggrieved could seek his remedy in either Court. He was, however, obliged to make choice between the two tribunals, and a motion to the presiding Justice precluded a resort to the Ap-

pellate Court either by motion or exceptions. *Averill* v. *Rooney*, 59 Me., 580; *Dinsmore* v. *Weston*, 33 Me., 256. A motion to either tribunal operated as a waiver of right to apply to the other. This rule, however, was abrogated by Chap. 66 of the Public Laws of 1939, which reads as follows:

> "If such decision is unfavorable to the moving party, no judgment shall be entered in the action until the expiration of 10 days thereafter, during which period such moving party may file another motion to have the verdict set aside as against law or evidence as provided in section 59, without prejudice by reason of the denial of the previous motion by the presiding justice, and all proceedings thereon shall be in accordance with the provisions of said section 59."

Upon the defendants' motion for a new trial the presiding Justice entered an order, the essential part of which was as follows:

> "The motion is sustained in this case unless within twenty (20) days from the filing of this decree, plaintiff shall file a remittitur with the clerk of courts of Androscoggin County of all of the amount recovered in excess of $1,500."

Subsequent to the filing of the order by the presiding Justice and within ten days of the time when the order was filed, the defendants filed in the Superior Court a motion authorized by Sec. 59, as we have before outlined, asking a new trial on the same grounds as presented in their motion to the presiding Justice, except that the allegation that the damages were excessive was omitted. No transcript of the evidence or copy of the record was filed by the defendants and no order as to the filing of the same was obtained or asked for from the presiding Justice.

The twenty days named in the order of the presiding Justice,

in which a remittitur might be filed, passed without such remittitur being filed. The defendants did nothing further to complete their second motion. The same, however, was certified by title only, without transcript of evidence or copy of record by the Clerk of that Court to the Clerk of this Court, who entered it upon this docket.

The plaintiff filed a motion to this Court to dismiss for want of prosecution, which motion was denied, but the Court ruled that the motion of the defendant, being unaccompanied by a transcript of the evidence, was improperly upon its docket, and dismissed it therefrom for that reason. When the dismissal was ordered, the Court had before it no record of the case. There was upon its minutes only the notation on its docket of entry of the case by its title. It did not, and could not then, pass upon any proceedings in the Superior Court and its order of dismissal from this docket carried no intimation of what was the status of the case in the Superior Court.

A motion was thereupon made in the Superior Court by the plaintiff for judgment in the full amount of the verdict of the jury. The presiding Justice issued his order granting the motion and to this order the defendants filed exceptions.

Did the defendants' second motion waive their first motion and vacate the order of the presiding Justice made thereon? If such was its effect, the defendants, having failed to carry through their second motion, there was nothing pending in the case as it stood in the Superior Court at the time of the motion of the plaintiff for judgment upon the verdict to prevent the granting of that motion by the presiding Justice, the granting of which is the subject of the exceptions. On the other hand, if the second motion did not vacate the conditional order for a new trial, the order became unconditional and absolute upon the expiration of the twenty day period by the failure of the plaintiff to file remittitur as required if she would prevent the order for a new trial becoming effective. That the order did become effective is the contention of the defendants.

It was the clear intent of the amending statute to give to the aggrieved litigant, in place of a choice of one of the two tribunals, access to both, the motion to the Appellate Court to be exercised upon "denial" of his previous motion to the presiding Justice. It cannot be gainsaid that the order filed by the presiding Justice was neither a grant or denial of a new trial asked for by the defendants. It would not be either until the plaintiff had exercised her option of filing the remittitur or allowing the twenty day period to elapse without so doing. The statute is so worded, however, that the litigant must file his motion to the Appellate Court within ten days after the filing of the decision by the presiding Justice, and this is so, even though by reason of the provision as to remittitur that order has not become effective as a grant or denial of the motion. To hold that the filing of a second motion within the ten day period provided, and before the exercise of the option by the plaintiff as to remittitur, is a waiver of the first motion, would be to limit the litigant to one tribunal. Under such ruling if the litigant filed his second motion he would lose his motion to the presiding Justice before the order thereon has become either a grant or denial. If, on the other hand, he should wait until the order of the presiding Justice has matured as to its effect, he would lose his right to invoke the jurisdiction of the appellate court. It is contrary to the purpose of the statute to impose such a limitation. The filing of the second motion before the expiration of the ten day period was a compliance with the terms of the statute and indicated only an intent to preserve the right to invoke the jurisdiction of the appellate court if the order of the presiding Justice, by filing of the remittitur by the plaintiff, became effective as a denial of a new trial. Such was the reasoning in *Hull* v. *Bell Bros.*, 54 Ohio State, 228, 43 N. E., 584. The statute of that state provided for an appeal to the Circuit Court and also process designated as "prosecuting error" to the Supreme Court. The defendant gave notice of appeal and also filed notice of prosecuting error within the time allowed for that procedure,

but before final action upon his appeal. The Court said:

> "We are not aware of any statutory provision, or rule of law which prevents a party who has taken an appeal from a judgment, from also prosecuting error to obtain its reversal. When doubtful of his appeal, that may be a prudent and commendable practice; otherwise, if his right of appeal should not be determined until after the expiration of the time allowed for prosecuting error, and then be determined adversely to him, thus leaving the judgment in force, his remedy on error would be lost."

This language was repeated in *Jennie* v. *Walker*, 80 Ohio State, 100, 88 N. E., 123. A similar conclusion was reached by the Rhode Island Court in *Lagace* v. *Belisle Bros.*, 45 R. I., 200, 121 A., 395, and in *Barker* v. *Barker Artesian Well Co.*, 45 R. I., 297, 121 A., 117.

The statute of that state gave the right of a motion to the presiding Justice for a new trial and right of exceptions to the Appellate Court, notice thereof to be filed within seven days from notice given by the Clerk of Courts of decision upon the motion to the presiding Justice. In each of these cases the defendant filed motion to the presiding Justice, who issued an order for a new trial unless remittitur should be filed within ten days. Within seven days from the date of notice by the Clerk the defendant also filed notice of intention to prosecute a bill of exceptions. The plaintiff failed to file the remittitur within the ten days allowed. It was held that the filing of the bill of exceptions was not inconsistent with the maintenance of his motion to the presiding Justice and that, when the plaintiff failed to file the remittitur within the ten day period allowed, the order became final as a grant to a new trial. Denying the exceptions in each of these cases, the Court returned the same to the Superior Court for a new trial, in accordance with the order of the presiding Justice.

If it be claimed that the plaintiff was misled by the second

motion and therefore failed to file remittitur, and that the defendants should be stopped from asserting their rights to the benefits from the order of the presiding Justice, it must be upon the assumption that the plaintiff intended to file the remittitur, and as to her intention in this respect nothing appears in the record. But it must be also said that a litigant is not justified in interpreting the purpose of the pleadings of the opposite party except according to the legal import thereof. The filing of the second motion did not constitute a waiver of the first motion not vacate the pending order of the presiding Justice, and the plaintiff was not entitled to so interpret it. But aside from the legal interpretation of the import of the filing of the second motion, we see nothing to mislead or confuse the plaintiff. She had failed to indicate her intention as to filing the remittitur and she knew that therefore the defendants were unable to determine what whould be the final effect of the order of the presiding Justice and that a right to invoke the jurisdiction of the appellate court must be secured by filing the motion within the ten day period. It was also apparent that it would hardly be in the interests of the defendants to waive the order already issued, potentially a grant of a new trial, and to substitute therefor the more complicated and expensive process of a motion to the appellate court with the uncertainty of the result to be obtained.

The result arrived at we believe must follow from the application of correct legal principles and we find nothing in the record of the instant case to indicate that such result is otherwise than in the furtherance of justice. On the other hand it might well be questioned, if justice had resulted, if the plaintiff were to have judgment upon a verdict which the Justice who had presided at the trial and heard the evidence, had judicially pronounced to be excessive by two-thirds of the maximum amount that the jury was justified in awarding.

It must be held that at the expiration of the twenty days given in which to file a remittitur the order of the presiding

Justice of the Superior Court became effective as the grant of a new trial. The plaintiff was therefore not entitled to judgment upon the verdict.

The entry must be:

Exceptions sustained. Case remanded to the Superior Court for a new trial, as ordered by the presiding Justice of that Court.

Dissenting Opinion

THAXTER, J. I cannot concur in the opinion in this case. The interpretation which it puts on the statute in question not only does violence to the language which the legislature has used but injects confusion into a procedure which should be simple.

What is meant by the word "decision" in the statute? It refers to the order of the presiding justice which in this case granted a new trial conditionally. He had acted on the motion of the defendants; his authority over the case was ended; and his ruling was no less a decision because the new trial was granted on a condition, viz., the plaintiff's refusal within twenty days to give up $1,000 of the award. This is not a case, like some of those cited in the opinion, which deals with a statute giving a right of appeal from an order either granting or refusing a new trial, under which circumstances we should have no hesitation in holding that the right of appeal does not accrue until the order becomes absolute. Our statute is different. We are concerned not with an appeal from such an order but with an independent motion addressed to the Law Court, and particularly with the time within which the motion must be filed. The statute on this point is clear and explicit. Pub. Laws 1939, Chap. 66.

"If such decision is unfavorable to the moving party, no judgment shall be entered in the action until the expiration of 10 days thereafter, during which period such moving party may file another motion to have the verdict set aside as against law or evidence as provided in section 59, without prejudice by reason of the denial of the previous motion by the presiding justice, and all proceedings thereon shall be in accordance with the provisions of said section 59."

The defendants by their motion asked for a new trial unconditionally; and it cannot be denied that they had the right to treat the conditional grant of the new trial as an unfavorable decision. They were placed in no dilemma by having to file their motion addressed to the Law Court within ten days thereafter. To be sure such filing was in a sense an election; but the choice which they made could have had no adverse consequences for them. If they had been willing to pay the amount of the award as reduced by the presiding justice, all that they needed to do was to wait for the twenty-day period fixed by the presiding justice to run to find out if the plaintiff would file the remittitur. If the plaintiff did not file the remittitur, the defendants automatically got the unconditional new trial for which they had asked. By filing their second motion addressed to the Law Court, the defendants in effect said to the plaintiff: "We elect to treat the decision of the trial justice as a denial of our motion for a new trial. We shall not pay the reduced amount of $1,500 even if you file the remittitur." That this was their intent is made crystal clear by their brief which is before us. In fact they say that their purpose in filing the second motion was to protect their "right to have the case passed upon by the Law Court under the amended statute in the event that the plaintiff filed the remittitur within the time fixed by the Court in its decision." Under these circumstances, why was there any reason or purpose in the plaintiff's filing the remitti-

tur? Should the defendants, having by their conduct placed the plaintiff in this position, then be permitted to shift their ground and claim that a new trial has been given to them by reason of the plaintiff's failure to take action which they had in effect said would be futile? Did not the plaintiff have the right to assume that the question was from that time on committed to the Law Court? It was the plaintiff, rather than the defendants, who was placed in a dilemma, a dilemma as it were in retrospect, occasioned solely by the construction which this court has put on the statute in question.

A statute such as ours is unusual. In fact our attention has not been called to a similar one in any other jurisdiction. For this reason, as we have suggested, the cases cited in the opinion are not in point. It is, however, significant that in the only jurisdiction where the status of an order granting a new trial conditionally has been considered, the ruling has been in accord with the views which we here express. *Kaminisky* v. *Levin*, 46 R. I., 250, 126 A., 641. In this Rhode Island case a motion for a new trial addressed to the presiding justice by a defendant was granted unless the plaintiff should within ten days file a remittitur. The Rhode Island statute provided that exceptions must be prosecuted within seven days after notice of decision on a motion for a new trial. The court held that exceptions were too late, if filed more than seven days after notice of the decision, although within seven days from the limit of time fixed for filing the remittitur. The court said, page 252: "The action of the justice with regard to the remittitur did not affect the explicit requirements of the statute prescribing proceedings for bringing exceptions to the court." The significance of this opinion is that the court did not regard it as even open to question that the time commenced to run from the date of the notice of the decision of the presiding justice granting a new trial conditionally.

One thing more. The decision which the majority of this court now renders is inconsistent with the action which we have

already taken in this case. The defendants' motion came before us at a previous term. The order which we then entered reads as follows:

> "The motion to overrule for want of prosecution the general motion for a new trial on which this case comes forward is denied. It appearing, however, that a report of the evidence has not been prepared as required by Rule XII (This should read Rule XVII) of the Supreme Judicial and Superior Courts, the case is dismissed from this docket."

Did we not in effect say: "The motion for a new trial is properly before us except for the fact that the defendants have not filed a report of the evidence as required by Rule XVII"? If the motion had at that time no effect whatsoever, as the opinion of the court now holds, why did we not give that invalidity as the reason for dismissing it? What better reason could have been found? By dismissing the motion in the form we did, we in effect said to counsel: "If you get from the judge below an extension of time for filing the evidence and file the report of evidence within the time fixed, we will hear your motion." And we quite plainly told the presiding justice: "You have two alternatives (1) grant an extension of time to the defendants if they wish it; or (2) if they will not ask for that, you must enter judgment on the verdict." The presiding justice took us at our word and, on the defendants' refusal to ask for the extension, entered the order for judgment. Are we now to overrule him for doing exactly what we told him to do?

In our opinion the exceptions should be overruled. Manser, J., joins in this dissent.

SACO DAIRY COMPANY *vs.* THOMPSON NORTON.

York. Opinion, February 2, 1944.

Principal and Agent. Trade Name. Burden of Proof.

If an agent who negotiates a contract in behalf of his principal would avoid personal liability, the burden is upon him to disclose his agency to the other contracting party; and his disclosure must include not only the fact that he is an agent but also the identity of his principal.

The use of a trade name in a business transaction is not sufficient in itself to constitute a notice of agency. The burden is upon the agent to disclose his agency.

In the instant case, the use of the name "Breakwater Court" was not, as a matter of law, a disclosure of the agency of the defendant.

Whether a disclosure of agency has been made depends upon the facts and circumstances surrounding the transaction and, unless only one inference can legally be drawn from the facts, the question is to be decided upon the judgment of the trier of facts.

In the instant case, the fact that goods previously furnished had been paid for by a check signed "Kate F. Norton, by R. T. Norton, Atty." was a fact proper for consideration, but it was not, as a matter of law, a disclosure of the agency, nor was it evidence of such probative force that the presiding justice was bound to consider it conclusive of itself or in connection with other facts submitted.

ON EXCEPTIONS.

Action by plaintiff for value of goods furnished. The defendant, during the time in which the supplies sued for were furnished, was manager of a hotel known as "Breakwater Court," the proprietor of which was defendant's mother, Kate F. Norton. In purchasing supplies the defendant acted in behalf of the hotel and there was no discussion with the representative of the plaintiff corporation as to who was the owner or proprietor of the hotel. The bills were made out to "Breakwater Court." The account for a previous year had been paid

by a check signed "Kate F. Norton, by R. T. Norton, Atty.". The sole issue in the trial court was whether there was sufficient disclosure by the defendant of his agency. Judgment was for the plaintiff. Defendant excepted. Exceptions overruled. The case fully appears in the opinion.

William H. Stone,

Armstrong & Spill, for the plaintiff.

Brooks Whitehouse, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The above cause comes to this Court on exceptions by the defendant to the findings of the Justice of the Superior Court sitting without a jury.

The case was submitted to the Justice upon an agreed statement set forth in the bill of exceptions as follows:

> "The plaintiff, Saco Dairy Company, is a Maine corporation engaged in the delivery of dairy products. The defendant, Thompson Norton, during the years 1941 and 1942, was manager of a summer hotel at Kennebunkport known as Breakwater Court. Breakwater Court is a large hotel containing about 150 rooms. It was owned during 1941 and 1942 by Kate F. Norton, the defendant's mother, in her individual right. During the summer of 1941 the plaintiff, through one of its officers Gordon F. Ilsley, had a number of interviews with the defendant and as a result sold a substantial amount of dairy products for use in the hotel. At no time was there any discussion between Ilsley and the defendant as to who owned Breakwater Court and Ilsley never charged defendant with personal liability. All bills were rendered by the plaintiff in the name Breakwater Court and the total bill for 1941 was paid by a check signed Kate F. Norton

by R. T. Norton, Atty. During 1942 more dairy products were sold to the hotel and billed to Breakwater Court as before. No discussion was had between any representatives of the plaintiff and the defendant as to who was owner of Breakwater Court. The bills for 1942 were not paid and are the subject of this suit. Kate F. Norton was not at any time during the events described above, registered as owner of Breakwater Court as required by R. S. Chapter 44, Section 5."

We are justified in assuming from the treatment of the subject in the respective briefs that the ownership of the hotel by the defendant's mother, as set forth in the agreed statement, included proprietorship of the business conducted therein.

The sole issue raised between the parties was whether the agency of the defendant was disclosed to the plaintiff. It was not in dispute that the goods were purchased by the defendant for the benefit of a third party, but the plaintiff claims that no disclosure of his agency was made by the defendant at the time of the transaction. The presiding Justice found for the plaintiff.

The defendant contends that "the fact that the particular entity of a trade name is unknown, i.e., whether it is a corporation, partnership or individual does not justify the application of the doctrine of undisclosed principal." In other words, that the use of the name "Breakwater Court" in the purchase of the supplies was a sufficient disclosure of agency by the defendant to avoid personal liability for the payment thereof.

If an agent who negotiates a contract in behalf of his principal would avoid personal liability, the burden is upon him to disclose his agency to the other contracting party. And his disclosure must include not only the fact that he is an agent, but also the identity of his principal. 2 *Am. Jur., Agency,* 404; *Keene v. Sprague,* 3 Me., 77, 80; *Baxter v. Duren,* 29 Me., 434, 50 Am. Dec. 602; *Merriam v. Wolcott, et al,* 3 *Allen* 258, 80

Am. Dec. 69; *Amans v. Campbell,* 70 Minn., 493, 73 N. W., 506, 68 Am. St. Rep., 547; *Ye Seng Co.* v. *Corbitt and Macleay,* 9 Fed., 423; *Meyer, et al.* v. *Barker,* 6 Binn. (Pa.) 228; *Cobb* v. *Knapp,* 71 N. Y., 348, 27 Am. Rep., 51; *Nelson* v. *Andrews,* 44 N. Y. S., 384; *Danforth and Carter* v. *Timmerman,* 65 S. C., 259, 43 S. E., 678; *Kelly* v. *Guess,* 157 Miss., 157, 127 So., 274.

The fact that a contract is negotiated by an agent, under a trade name, is not of itself a sufficient disclosure of his agency. In the *Amans* v. *Campbell* case, one Campbell, who was the manager of a business belonging to his wife, in making a contract in relation to the business, signed "Campbell & Co." without indicating in any way that he did so as agent. It was held that the mere use of the name "Campbell & Co." did not amount to a disclosure of his agency for his wife, Delia Campbell, doing business under the name of "Campbell & Co."

In *Ye Seng Co.* v. *Corbitt and Macleay,* the defendants executed a contract as "Agent for owners of the American Bark Garibaldi of Portland, Oregon." It was held that the identity of the principal was not disclosed.

In *Meyer, et al.* v. *Barker,* the defendant executed a charter party as "Agent for and in behalf of the American Ship Diana, Samuel Holmes, Master." It was held that this was not a disclosure of the principal.

In *Nelson* v. *Andrews,* it was held that the use of the name "Bradford Estate" was not a disclosure of the identity of the principal.

In *Cobb* v. *Knapp,* it was held that the use of the name "Blissville Distillery" was not conclusive as a disclosure of the principal. The Court in that case said: "It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."

While the facts set forth in the cases enumerated are not identical with those of the instant case, each of those cases maintains the principle that the use of a trade name is not in itself a sufficient disclosure.

The fact that the defendant was operating the business of a hotel under the name of "Breakwater Court" was at least as consistent with the fact that he was the proprietor as that he was the manager for another. It is common knowledge that a business may be conducted in either of these ways.

Whether a disclosure of agency has been made depends upon the facts and circumstances surrounding the transaction, and, unless only one inference can legally be drawn from the facts, the question is to be decided upon the judgment of the trier of facts, which in this case was the presiding Justice. *Mechem on Agency*, 1422; *Cobb* v. *Knapp*, supra; *Neely* v. *State*, 60 Ark. 66, 28 S. W., 800, 27 *L. R. A.*, 503; *Hurricane Milling Co.* v. *Steel & Payne Co.*, 84 W. Va., 376, 380, 99 S. E., 490, 6 *A. L. R.*, 637.

It is not to be questioned that a trade name may be used under such circumstances that agency will be sufficiently disclosed, and counsel for the defendant suggests transactions with attendant circumstances that would have a tendency to impart knowledge of agency, but in such case a question of fact would be raised which would be determined by the fact-finding tribunal. Counsel also cites the case of *Hess* v. *Kennedy*, 171 N. Y. S., 51, in which it was held that the failure of a clerk or superintendent in a retail clothing store to disclose to a customer that she was not the proprietor, did not render her liable for the price of a garment returned. The decision in no manner disaffirms the principles that we apply in the instant case. The conclusion arrived at in the cited case necessarily resulted from the universally recognized limitations of authority and responsibility of sales clerks in a shop that invites the public to become its customers with the intent on the part of both shop and customer that they will be responsible,

each to the other, for the fulfillment of their respective obligations.

The defendant further claims that by reason of the payment of goods furnished during the previous year by a check signed "Kate F. Norton, by R. T. Norton, Atty." the plaintiff knew of the agency and identity of the principal. This was not, as a matter of law, a disclosure of the agency, nor was it evidence of such probative force that the Justice was bound to consider it conclusive of itself or in connection with other facts submitted. The statement of facts does not disclose that the check came to the knowledge of the official who negotiated the sale of the supplies to the defendant, nor is it disclosed that it ever came to the attention of any official or employee of the plaintiff corporation, the knowledge of whom would bind the corporation. It might well be that the check was received in such routine manner that it had little or no significance on the question of knowledge of the plaintiff. In *Baldwin, et al.* v. *Leonard,* 39 Vt., 260, 94 Am. Dec., 324, a sale was made by a partnership to an agent whose agency was known by one partner, but not by the one making the sale. It was held that the partnership was not chargeable with knowledge of the agency. Nor would use of such a check be at all conclusive of proprietorship of "Kate F. Norton." It is not uncommon for a person to have a power of attorney to draw upon funds for his own benefit and for purposes in which the owner of the deposit has no interest. It would be entirely consistent with the loaning of money to be drawn as needed by the loanee in carrying on his own business.

The use of the name "Breakwater Court" was not, as a matter of law, a disclosure of the agency of the defendant, and it cannot be said that upon all of the facts presented the Justice was not warranted in finding that there was no such disclosure. The entry must be

Exceptions overruled.

STATE OF MAINE

vs.

MARY ALTONE ET AL., ALFRED WINICK, PETITIONER.

Cumberland. Opinion, February 5, 1944.

Bail.

Money deposited as bail is regarded as belonging to the respondent and, if the conditions of the recognizance are fulfilled, can be returned only to the respondent or to a third person on order of the respondent.

The general rule is that it is not an abuse of discretion on the part of a court to order the forfeiture of bail even though the failure of a respondent to appear is due to his imprisonment in another jurisdiction for an offense committed there.

ON EXCEPTIONS.

Petition for return of money deposited with the Clerk of the Superior Court. In October, 1942, the respondent was arraigned in the Municipal Court of Portland on the charge of larceny. She was ordered to recognize in the sum of $3,000.00 for her appearance at the January term of the Superior Court held in the County of Cumberland. The petitioner deposited with the clerk of the Superior Court $3,000.00 in cash for her appearance as ordered. On November 13, she was convicted in the State of New York of petty larceny and was imprisoned in that State and was serving sentence there at the time of the session of the January term in Cumberland County, Maine, to which she had been ordered to appear. The petitioner represented to the justice of the Superior Court sitting at the January term that because of the respondent's imprisonment he was unable to produce her in court in Maine but expressed his intention to bring her to Maine to answer the charge against her upon her release from prison in New York. His pe-

tition was denied. Petitioner excepted. Exceptions overruled. The case fully appears in the opinion.

Richard Chapman, County Attorney, for the State.

Max L. Pinansky, for the petitioner.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, JJ.

CHAPMAN, J. did not participate.

THAXTER, J. October 20, 1942 the respondent, Mary Altone, was arraigned in the Municipal Court for the City of Portland charged with the larceny of property of the value of more than one hundred dollars. She was ordered to recognize in the sum of $3,000.00 for her appearance at the January Term of the Superior Court sitting within and for the County of Cumberland. The petitioner, Alfred Winick, deposited with the Clerk of the Superior Court $3,000.00 in cash as bail for her appearance as ordered. At the time she was under indictment in the State of New York for the crime of grand larceny in the second degree. She was convicted on this indictment on November 13, 1942 of the crime of petty larceny and was imprisoned in the penitentiary of the County of Kings in the State of New York. She was serving this sentence at the time of the session of the January Term of the Superior Court here to which she was ordered to recognize.

The petitioner represented to the Justice of the Superior Court sitting at the January Term that because of the imprisonment of the said respondent in the State of New York he was unable to produce her in court in this jurisdiction. He expressed his intention to bring her here to answer the charge in the indictment returned against her when she should be released from confinement in New York. He prayed that the cash bail be returned to him. The petition was denied and the bail was ordered defaulted and turned over to the county

treasurer. The case is before us on the petitioner's exceptions to these rulings and to the exclusion and to the admission of certain evidence.

In the first place we should call attention to the fact that the petitioner had no standing before the court to which he addressed his petition. Under the terms of the applicable statute, Rev. Stat. 1930, Chap. 145, Secs. 28-31, money deposited as bail is regarded as belonging to the respondent, and in this instance, had the conditions of the recognizance been fulfilled, could have been returned only to the respondent or to a third person on her order. This is clearly the meaning of our statute and such has been the interpretation of analogous statutes by courts in other jurisdictions. *Jacobson* v. *Hahn,* 14 F. (Supp.) 339 (D. C. N. D. N. Y. 1936); *U. S.* v. *Werner,* 47 F.(2d) 351 (D. C. N. D. Okla. 1931); *U. S.* v. *Widen et al.,* 38 F. (2d) 517 (D. C. N. D. Ill. 1930); *Young* v. *Stoutamire,* 131 Fla., 834, 180 So., 31; *State* v. *Friend,* 212 Ia., 136, 236 N. W., 20; *Arnsparger* v. *Norman,* 101 Ky., 208, 40 S. W., 574; *People ex rel. Kopp* v. *French,* 102 N. Y., 583, 7 N. E., 913; *Whiteaker* v. *State,* 31 Okla., 65, 119 P., 1003; *Rosentreter* v. *Clackamas* County, 127 Ore., 531, 273 P., 326; *State ex rel. Glidden* v. *Fowler,* 192 Wis., 151, 212 N. W., 263; 6 Am. Jur., 77; 8 C. J. S. P. 108. The petitioner was not a surety who had assumed any obligation to have his principal before the court, and consequently had no right to take the body of the respondent and deliver her either to the court or to the jailer as he said in his petition he would do when she should be discharged from imprisonment in New York. So far as these proceedings go, he is an outsider. In this connection the case of *Arnsparger* v. *Norman, supra,* is peculiarly in point. Cash bail was deposited by a third person for a respondent who failed to appear and was defaulted. The Kentucky code provided that money deposited in lieu of bail should, after forfeiture and final adjournment of court, be entered to the credit of the jury fund and this procedure was followed. At a subsequent term of court

a judgment was obtained for the amount of the bail against the so called surety who had deposited the money. The case holds that this judgment was a nullity because in accordance with the statute the money was forfeited to the state as the money of the respondent and no proceeding against the one who advanced it was necessary or in fact authorized.

These observations would seem to dispose of the case. With respect to the argument of counsel that the court had no right to order the forfeiture of bail in this instance, we will, however, say that the general rule is that it is not an abuse of discretion on the part of a court to order forfeiture of bail even though the failure of a respondent to appear is due to his imprisonment in another jurisdiction for an offense committed there. *Taylor* v. *Taintor*, 16 Wall. (U. S.) 366, 21 L. Ed., 287; *Cain* v. *State*, 55 Ala., 170; *State* v. *Horn*, 70 Mo., 466, 35 Am. Rep., 437; *King* v. *State*, 18 Neb., 375, 25 N. W., 519; *State* v. *Eller*, (1940), 11 S. E. (2d), 295, 218 N. C., 365; *Ricks* v. *State*, 189 Okla., 598, 119 P. (2d), 51; *Devine* v. *State* (Tenn.), 5 Sneed, 623; cf. *State* v. *Burnham*, 44 Me., 278; 6 Am. Jur., 103.

The instant case is entirely different from *State* v. *Parent*, 132 Me., 433, 172 A., 442, which hold that sureties are not liable for failure to produce a respondent in court in accordance with the terms of the recognizance, when such failure is due to the act of the state itself which is the obligee in the recognizance.

Exceptions overruled.

INHABITANTS OF THE TOWN OF MERCER

vs.

INHABITANTS OF THE TOWN OF ANSON.

Somerset. Opinion, February 5, 1944.

Pauper Settlement.

Towns have no vested rights in pauper settlement.

Chapter 203, Public Laws 1933, changed the previous laws of settlement and controls where pauper relief has been furnished subsequent to its passage.

ON REPORT.

Action to recover for pauper supplies furnished to one alleged by the plaintiffs to have a pauper settlement in the defendant town. The only question in the case was whether the pauper to whom supplies were furnished had a pauper settlement in the defendant town at the time the supplies were furnished. It was held that he did not have a settlement in the defendant town at that time. Case remanded for entry of judgment for the defendant town. The case fully appears in the opinion.

Clayton E. Eames, for the plaintiffs.

Charles O. Small,

Merrill & Merrill, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. This is an action to recover for pauper supplies and is before us on report on an agreed statement. The supplies were furnished March 18, 1942, and the sole question

is whether William C. McFadzen, the pauper, had a settlement in the defendant town on that date.

He was the legitimate son of William and Annie Fish McFadzen and was born in New Brunswick June 22, 1906. His father did not have a pauper settlement in Anson or in the State of Maine and never acquired one. His mother did have a pauper settlement in Anson when she was married, and when the son was born, and never acquired a new one after her marriage.

The plaintiff claims that the pauper had the derivative settlement of his mother, and for this contention relies on the provisions of Rev. Stat. 1930, Ch. 33, Sec. I, Par. I and II which prior to their amendment read in part as follows:

> "I. A married woman has the settlement of her husband, if he has any in the state; if he has not, her own settlement is not affected by her marriage."
>
> "II. Legitimate children have the settlement of their father, if he has any in the state; if he has not, they have the settlement of their mother within it; . . . "

These portions of the statute as amended in 1933, Pub. Laws 1933, Ch. 203, Secs. 1 and 2 read as follows:

> "I. *Pauper settlement further defined.* A married woman has the settlement of her husband, if he has any in the state; if he has not, she shall be deemed to have no settlement in the state."
>
> "II. *Settlement of children.* Legitimate children have the settlement of their father, if he has any in the state; if he has not, they shall be deemed to have no settlement in the state."

The plaintiff claims that the statute as amended was intended to have only a prospective operation and that its purpose was not to alter the status of settlements already existing at the time of its passage. Such is not the law. The case of *In-*

habitants of the City of Hallowell v. *Inhabitants of the City of Portland,* 139 Me., 35, 26 A. (2d), 652, is decisive of this. That case holds that towns have no vested rights in pauper settlements, and that the amendment of 1933 changed the law of settlement and controls where the relief is furnished subsequent to its passage.

Under the statutes in force at the time the supplies in question were furnished, the pauper did not, therefore, have a settlement in the Town of Anson. In accordance with the stipulation, the entry will be

Remanded for entry of
Judgment for the defendant.

JOHN VESANEN

vs.

CONRAD POHJOLA AND SNOW SHIPYARDS, INC., TRUSTEE.

Knox. Opinion, March 15, 1944.

Statutes. Release of Judgment Debtor from Custody.

Imprisonment of a judgment debtor on execution of the judgment against him is now, under our statutes, solely for the purpose of obtaining a discovery of the debtor's property and is no longer regarded as a satisfaction of the debt.

Release of a debtor from custody by the oral direction of the creditor does not constitute a satisfaction of the judgment. The validity of the judgment does not depend solely on release by the creditor's written permission.

The purpose of Section 61 of Chapter 124, R. S. 1930, was merely to lay down a procedure by which, after the discharge of the debtor from custody, the

original execution, or an alias execution, might be enforced against the property of the debtor rather than against his body and was merely declaratory of the law. It was not the intent of the legislature to imply that a release of a debtor from custody in any other way than by written permission of the creditor would discharge the debt and the judgment.

ON EXCEPTIONS.

Action of debt on a judgment. The judgment was recovered in the Superior Court sitting in Knox County. Execution was duly issued against the goods and estate and against the body of the debtor and he was arrested and imprisoned. On his promise to pay the amount due on the judgment in weekly installments, he was released from custody on the creditor's oral direction to the jailor. The debtor then claimed that because the direction to the jailor was not in writing the judgment was satisfied by reason of his arrest and subsequent discharge from custody. The presiding justice ordered judgment for the plaintiff. The principal defendant filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Frank F. Harding, for the plaintiff.

C. S. Roberts,

A. Alan Grossman, for the defendants.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J., dissenting.

THAXTER, J. This action of debt on a judgment was heard on an agreed statement of facts by the presiding justice who ordered judgment for the plaintiff. The case is before us on exceptions of the principal defendant.

The judgment was recovered at the November Term, 1941, of the Superior Court within and for the County of Knox. An execution was duly issued which ran against the goods and es-

tate, and against the body of the defendant. On this he was arrested and imprisoned. On his promise to the plaintiff to pay the amount due on the judgment in weekly installments of five dollars, he was released on the plaintiff's oral direction given to the jailer.

The defendant now claims that, because the direction to the jailer was not in writing, as provided by Rev. Stat. 1930, Ch. 124, Sec. 60, the judgment was satisfied by reason of the arrest and subsequent discharge from custody.

The statutory provision in question reads as follows:

> "A creditor may discharge his debtor from arrest, or imprisonment on execution, by giving to the officer or jailer having him in custody written permission to go at large; with the same effect as a discharge or disclosure."

Section 61 provides as follows:

> "A certificate of a discharge on execution in any of the modes hereby authorized, and of the cause of it, shall, at any time, at the creditor's request, be indorsed on the execution by the officer who had such debtor in custody; and if it is before the return day of the execution, it may still be levied on his property; if after, it may be renewed like other executions, against his property only; and the judgment may be revived or kept in force, with said execution, as judgments in other cases."

The argument of the defendant is that at common law the arrest of a debtor on an execution, or at least his arrest followed by his discharge, was a satisfaction of the judgment and that this common law rule is still in force except in so far as it may have been modified by statute. Consequently, it is contended, this plaintiff could have preserved his right to sue on the judgment only by a written permission given to the jailer that the debtor be discharged. If the rule were otherwise what, it is argued, is the purpose of providing in section 61 that, if the

statutory provision is followed, the judgment may be kept in force?

It is hardly necessary to point out the injustice which is done, if the defendant, securing his release by his promise to pay the debt over a period of time, is permitted to repudiate his promise and claim a satisfaction of his obligation because of such discharge from custody. It is the duty of the court to interpret statutes in such a way as to carry out the purpose of the legislature, and we are loath to believe that any legislature intended to establish any such doctrine as that for which the defendant now contends. We should bear in mind the words of Judge Shepley in *Spencer* v. *Garland*, 20 Me., 75, 76, where the defense to an action on a judgment was that the judgment had been discharged by the release of the debtor on giving a poor debtor's bond: "And if this action cannot be maintained the effect will be, that the defendants by giving a bond and neglecting to perform the condition without any payment extinguish the judgment, and deprive the plaintiffs of the right to collect the debt. The statute for the relief of poor debtors cannot receive such a construction."

The defendant asks us to revert to the common law rule which was based on the right of the creditor to take the body of his debtor and confine him in jail until the debt should be paid, a doctrine which regarded the custody of the body as so far a satisfaction of judgment that on the debtor's discharge the creditor lost all right to collect his debt. *Coburn* v. *Palmer*, 10 Cush., 273; *Jones* v. *Jones*, 87 Me., 117, 32 A., 779. It was a procedure which this court in *Jones* v. *Jones* has branded as involving degradation and punishment in distinction from the "humane system" set up by our statutes which permits imprisonment only for the purpose of obtaining discovery of the debtor's property. This archaic principle, condemned by the sound judgment of a more enlightened age, was swept aside by statute even before Maine became a state. Mass. Laws 1780-1807, Vol. I, 401: "An ACT for the Relief of poor Prisoners

who are committed by Execution for Debt." (Nov. 19, 1787).

A study of the various statutory enactments and the cases interpreting them convinces us that the defendant's contention cannot be sustained that the validity of the judgment depended solely on the release of the debtor on the creditor's "written permission."

The early Massachusetts statute cited above was enacted in 1787. It provided that a debtor might be released from custody on taking an oath that he had no property sufficient to support himself in jail. This act in principle modified the whole concept of imprisonment for debt. No longer was the creditor given the absolute right to keep his debtor in jail until the debt was paid; and, consequently, since that time arrest on an execution has no longer been regarded as a satisfaction of the debt. As a consequence a judgment remains valid and enforcible even though the debtor may have been released from custody. *Jones* v. *Jones, supra.* On February 5, 1820, just prior to the time when Maine became a separate state, Massachusetts enacted another statute which provided that the creditor should be liable for the support in jail of a debtor committed on mesne process or on an execution. Mass. Gen. Laws, 1799-1821, Ch. 94. There was also included a provision that the creditor might at any time discharge the debtor from custody and that such discharge should not operate to release the debtor from the debt. When therefore Maine became a state, these statutes were in effect here; and it was therefore established law here that a poor debtor might be released either on his taking the oath prescribed by the statute or by order of the creditor, and in neither case did such release operate to discharge the debt. Subsequently our legislature took care of the subject by statute. First came the act of March 21, 1821, Acts & Resolves 1820-1821, Ch. 122, Sec. 13. There was reenacted here the provision of the Massachusetts act which rendered the creditor liable for the support of the debtor in jail, subject to the right of the creditor to discharge the debtor from custody without

such discharge operating to release the debtor from the debt. Then in 1822, Acts & Resolves 1822-1831, Ch. 209, we find a general statute governing the release of poor debtors. Section 12 of this act is similar to that in the Massachusetts Act of 1787 providing for the discharge of a debtor from prison on his taking an oath that he had no property sufficient to support himself in jail. Section 18 of the act provided that a judgment obtained against such debtor should remain in force "notwithstanding such discharge." Section 27 read as follows:

> "That whenever any creditor who may have caused his debtor to be arrested, or committed to prison on execution, shall think proper to discharge such debtor from such arrest or from prison, he shall have the right so to do, without affecting or discharging the judgment upon which such execution issued, by giving to the officer who made the arrest, or by leaving with the keeper of the gaol, a written permission for such debtor to go at large; and such discharge shall not operate to release the debtor from the debt and costs on which he was arrested or committed, but such debt and costs shall be and remain a legal claim against the goods and estate of such debtor; but the body of such debtor so released shall be, forever thereafter, exempted from arrest and imprisonment upon such execution and upon any execution which may be obtained in virtue of the judgment upon which such execution issued."

This is in substance the same provision as Rev. Stat. 1930, Chap. 124, Sec. 60, with which we are concerned in the present case. In determining whether as claimed by the defendant, the only method by which the debtor could be released without discharging the debt is by "written permission" of the creditor, we must remember that this statutory provision was not regarded as inconsistent with that already in effect providing for release generally at the direction of the creditor who was un-

willing longer to assume the obligation to pay the debtor's board. And significant also is the following section, 28, which provided that the jailer on his own initiative should release the debtor if the creditor did not provide for his board, and then there follows this proviso: "That such discharge shall not operate to release the debt or cost, on which such debtor was imprisoned." It would be illogical to hold that a discharge of a debtor on the oral direction of the creditor would amount to a satisfaction of the debt, if the creditor could accomplish the same result without discharging the debt merely by failing to provide for the support of the debtor in jail. In 1828, Acts & Resolves 1822-1831, Chap. 410, Sec. 3, the legislature specifically provided that where a debtor had been discharged on written permission of the creditor, or on taking the poor debtor's oath, the execution should be kept alive so that a levy might be made on it against the property of the debtor. The procedure for the relief of poor debtors was further amplified in 1831, Acts & Resolves 1822-1831, Chap. 520, and in 1835, Acts & Resolves 1832-1839, Chap. 195. The act of 1835, Sec. 12, contained the following specific provision:

> "That no release of any debtor or pensioner, (prisoner) under the provisions of this Act, shall affect or impair the right of the creditor to his debt or demand, but the same shall remain in full force against the property or estate of said debtor, and may be at any time satisfied out of any such property and estate, which may be discovered, and shall not by law be exempted from attachment and execution, in the same manner as if such discharge had not been made."

There was embodied in the revision of the statutes in 1841, Rev. Stat. 1841, Chap. 32, Sec. 33, the provision of the 1821 law that a creditor, unwilling to assume the obligation of a debtor's board, might release a debtor from prison without discharging the debt, also in Chap. 148, Sec. 42, the principle

of the 1835 law specifically providing for the validity of the debt, and in Chap. 148, Sec. 59, the provision of the 1822 law relating to release of the debtor on the "written permission" of the creditor. Section 60 of the same chapter incorporated the provision of the 1828 law under the terms of which the execution could be kept alive. In the same revision, Chap. 148, Sec. 19, we find the provision indicating that the purpose of arrest and imprisonment of a debtor on an execution is "for the purpose of obtaining a discovery of his property." This is now embodied in Rev. Stat. 1930, Chap. 124, Sec. 45. Such remained the state of the statutes until 1857. In the revision of that year there was dropped the general provision of the 1821 law relating to the right of the creditor to release his debtor without discharging the debt, also there was omitted the specific provision of the 1835 law that a discharge under the provision of the act for the "Relief of Poor Debtors" should not discharge the debt. Such is the essential history of the statutes on this subject.

Of prime importance in determining the legislative intent, in enacting in 1822 the clause providing for release of a debtor on the written permission of the creditor, is the relationship of that provision to the others which were in force with it. If, in the case of a release of a debtor with the consent of the creditor, it was the intent of the legislature that the judgment should remain valid only if such release was by the "written permission" of the creditor, what was the function of the law passed in 1821 providing without such qualification for the release of a debtor by the creditor without thereby releasing the debtor from the debt? Could these two provisions have remained together on the statute books for over thirty-five years, and have been reenacted together in 1841, if the clause relating to "written permission" means what the defendant now contends? If only by "written permission" could the debt be saved for the creditor, how can we account for section 28 of the act of 1822 which provides that the debt remains valid

if the debtor is discharged because of the creditor's refusal to provide for the debtor's board in jail?

We feel that a consideration of the origin and growth of the statutes governing this subject indicates without more the error of the defendant's interpretation. But beyond that the cases which discuss these various enactments support the construction which we place on the statute now in question.

In the first place we must be careful to distinguish between those cases which concern the validity of an execution and those which involve the validity of the judgment.

In *Miller* v. *Miller*, 25 Me., 110, the question was the validity of a levy made on an execution on which the debtor had been arrested, committed to prison, and subsequently discharged on taking the poor debtor's oath. Pub. Laws 1828, Chap. 410, Sec. 3, provided that where a debtor was discharged on written permission of the creditor or on taking the poor debtor's oath provided for in the statute, the execution might still be levied on the property of the debtor "by procuring the Sheriff or Gaoler to certify a true copy of such permission or certificate upon such execution." This is in substance the procedure set forth in Rev. Stat. 1930, Chap. 124, Sec. 61. The case holds true that, as there was no such return on the execution as required by the statute, the levy was void. The court points out the distinction between the act of 1835, Acts & Resolves 1832-1839, Chap. 195, Section 12, Rev. Stat. 1841, Chap. 148, Sec. 42, which provided for keeping the debt alive, and the act of 1828, Acts & Resolves 1822-1831, Chap. 410, Sec. 3, Rev. Stat. 1841, Chap. 148, Sec. 60, which to use the language of the opinion, page 114, "provided a remedy for the destruction of the life of the precept."

As has been pointed out there was omitted from the revision of the statutes in 1857 the provision of the act of 1835 providing specifically that a release of a debtor under the provision of the law for the Relief of Poor Debtors should not impair the right of the creditor to his debt. Just why this was omitted is

not clear, but probably it was because the whole policy of the law had so changed that arrest of the debtor followed by his release was no longer regarded as a satisfaction of the debt, and such an enactment was no longer regarded as necessary. This was certainly the view which Chief Justice Peters took when he wrote the opinion in *Jones* v. *Jones*, supra. This suit was an action of debt on a judgment. The defendant was arrested on an execution, gave a poor debtor's bond and was discharged on a disclosure. The court said, pages 118-119:

"It was contended at the trial of this case that no action can be maintained upon the judgment for the alleged reason that, by the provisions of the poor debtor chapter contained in the Revised Statutes of 1857, applicable hereto, the judgment was satisfied and discharged by the debtor's arrest and the giving of a bond for his release therefrom. The argument to sustain this position, which was sustained by the presiding judge, seems to have been that there was omitted from the statutes of 1857 an act which had existed in our statutes up to the date of that revision from the date of its passage in 1835 (see chap. 195, Laws of 1835), which act expressly provided that the discharge of a poor debtor upon his disclosure should not have the effect to impair any right which the creditor had to obtain satisfaction of his judgment out of the debtor's estate or property not exempted by law. The contention is that the supposed statutory omission revived the rights of the parties as they would have been at the old common law, under which an arrest of a debtor deprived the creditor of all other remedy for the collection of his debt.

"We cannot concede the correctness of any of these propositions. In the first place the law would be the same with or without the enactment of 1835. That act was a declaration merely of the law as it stood before, and this court virtually said so in its opinion in the case of *Spencer* v.

Garland, 20 Maine, 75. It necessarily resulted from our poor debtor laws that an arrest of a debtor and his subsequent discharge from arrest could not have the effect to bar the creditor from collecting his claim out of the debtor's property.

"The common law system and our statutory system on this subject are widely unlike. At the old common law an arrest upon an execution was largely designed as a punishment of the debtor for not paying his debt, and he could be held in imprisonment until he did pay it. On the contrary, our very humane system is one in no respect involving punishment or degradation, but seeks only to obtain a discovery of the debtor's property and its situation, in order that the creditor may be the better enabled to satisfy his judgment out of such property."

To be sure this was a release on disclosure but the broad language on which the court bases its opinion is applicable to any release howsoever obtained. For the opinion says in effect that no longer in this state is arrest and imprisonment regarded as a satisfaction of the debt; imprisonment now is solely for the purpose of obtaining a discovery of the debtor's property.

The case of *Moor* v. *Towle,* 38 Me., 133, supports the plaintiff's claim in the instant case. It was an action of debt on a judgment. The defendant pleaded that since the action was commenced, an alias execution was taken out on the original judgment, on which execution he was arrested and committed to prison, and there remained. The court held that the action could be maintained. The court said, page 133: "The commitment of the defendant on the execution did not discharge or annul the judgment on which it issued, nor discharge the action pending thereon."

It is suggested that this case is not in accord with *Clement* v. *Garland,* 53 Me., 427. Chief Justice Appleton who concurred in the opinion in the *Moor* case wrote the opinion in the

Clement case, and Judge Cutting concurred in both opinions. The cases are in no respect the same. The later case involves, not the validity of a judgment but of an execution and is in accord with the rule laid down in *Miller* v. *Miller,* supra.

See to the same effect as *Moor* v. *Towle, Clark* v. *Goodwin,* 14 Mass., 237, 239.

The cases in Massachusetts and in Vermont show significantly the general trend to disregard the old common law doctrine.

In *Raymond* v. *Butterworth,* 139 Mass., 471 (1 N. E., 126, 127), the court said, 471:

> "The suit was upon a judgment rendered against the plaintiff in error and one Bemis. Bemis was arrested upon the execution issued thereon, and was afterwards, by order of the judgment creditor, released from arrest; and the plaintiff in error contends that this operated as a discharge and satisfaction of the judgment. Whatever may be the common law doctrine as to the effect of the commitment of a debtor on execution, it has long been the settled law of this Commonwealth that a judgment is not discharged by such commitment and a subsequent release from arrest, but remains in full force against the party committed, and may be satisfied by a levy on his property, and, *a fortiori,* it remains in force against a joint judgment debtor. *Cheney* v. *Whitely,* 9 Cush., 289."

In *Willard* v. *Lull,* 20 Vt., 373, the court said, 377:

> "By the common law the body, when once arrested, is a *full* satisfaction of the debt. It is the same by our law, unless the body is discharged, with a promise to pay the debt on the part of the debtor; *Foster* v. *Collamer,* 10 Vt., 466; or unless the release is by operation of law. And at all events, the body, while held in confinement, is esteemed a *temporary satisfaction* of the debt. It does not operate as a release of collateral remedies, which are so far perfected

as not to depend upon any proceedings under the execution for their support."

As we have previously pointed out, the defendant claims that the release of a debtor from custody in any other way than is specifically authorized by statute discharges the debt. He falls back on the old common law rule and points out that Rev. Stat. 1930, Chap. 124, Sec. 60, authorizes the release on the written permission of the creditor, and that section 61 provides that if the statutory procedure is followed "the judgment may be revived or kept in force, with said execution, as judgments in other cases." Here it is contended are set forth, by inference at least, the conditions under which the judgment may be kept alive. This contention, not only ignores the fundamental principles which have been laid down in our own adjudications, but fails to take into consideration the history of the particular statutory provision. Section 61 of the present revision is a combination of sections 60 and 61 of Rev. Stat. 1841, Chap. 148. Section 59 of this chapter provided for release of a debtor on the written permission of the creditor; section 60 provided that the execution should be valid as against the property of the debtor, if written endorsement was made on the execution of a certificate showing that the debtor had been released in any of the modes specifically provided for by the statute; and section 61 provided that, whether such endorsement was made or not, the judgment should continue to be valid with the exception that no levy should be made thereafter on the body of the debtor. It is apparent therefore that the purpose of section 61 of our present law was merely to lay down a procedure by which, after the discharge of the debtor, the original execution or an alias execution might be enforced, no longer against the body, but against the property of the debtor. The reference to the judgment being "revived or kept in force" was merely declaratory of the law. *Jones* v. *Jones, supra.* It most certainly was not the intent of the legislature to imply

that a release of a debtor in any other way than by written permission would discharge the debt and the judgment.

The construction contended for by the defendant would do violence to legislative purpose as evidenced by all statutory enactments since Maine became a state, and particularly to the basic principle, Rev. Stat. 1930, Chap. 124. Sec. 45, that arrest on an execution is "for the purpose of obtaining a discovery" of the debtor's property. It would result, not in the furtherance of justice, but of injustice. It would set back the hands of the clock to a century and a half ago, when in a less humane age, a creditor was permitted to hold the body of his debtor until the debt was paid.

Exceptions overruled.

Dissenting Opinion

MURCHIE, J. I dissent from the foregoing opinion with very real reluctance because my conviction is as strong as that declared therein that the result does justice between party and party. A debtor who secures his release from imprisonment by a promise to pay which he fails to keep is entitled to no sympathetic consideration against his creditor's subsequent process seeking to reach his property. That fact notwithstanding, my belief is even more compelling that the issue as to whether this plaintiff be held to have forfeited his right to collect something less than $200 by his failure to use the safeguard authorized by R. S. (1930), Chap. 124, Sec. 60, pales into insignificance by comparison with that as to whether this Court will indulge in judicial legislation in his behalf.

All of our statute law pertinent to the present issue is contained, as at all times since the enactment of R. S. 1857, in a chapter entitled "Relief of Poor Debtors." Only two sections are directly involved and these are quoted in full in the majority opinion, R. S. (1930), Chap. 124, Secs. 60 and 61. That opinion asserts, however, that prior to 1857 legislation of con-

trolling force, contradictory of the word "written" as it appears in Section 60 and as it had appeared since 1822, was contained in R. S. (1841), Chap. 32, wherein the statutes dealing with paupers and their settlement and support were assembled. Why the provisions of Section 33 of that Chapter, authorizing a creditor subjected to process to recover the expense of maintaining his debtor, a pauper, in prison to release such debtor without formality, should have controlled the plain language of a statute dealing with imprisoned debtors who are not paupers, even while it appeared therein, is not disclosed in the opinion (nor is any attempt made to show how its priority effect continued after its repeal), but the declaration is definite that since Massachusetts Laws 1780-1807, Vol. 1, 401, "An Act for the Relief of poor Prisoners who are committed by Execution for Debt," enacted November 19, 1787, and Massachusetts Gen. Laws, 1799-1821, Chap. 94, enacted February 5, 1820, were in effect here when Maine became a state:

> "it was . . . established law here that a poor debtor might be released either on his taking the oath prescribed by the statute or by order of the creditor, and in neither case did such release operate to discharge the debt."

Our early legislatures must have taken a different view for the first enacted the provisions of Section 2 of the Massachusetts statute of February 5, 1820 in Stats. 1821, Chap. 122, Sec. 13, and the second purported in P. L. 1822, Chap. 209, Sec. 29, to repeal, *as respects this State,* that enacted November 19th, 1787. It was this P. L. 1822, Chap. 209, which first contained the provision authorizing a creditor to release his debtor imprisoned on execution for debt by a *written permission* without affecting his right to reach the debtor's property. It was this which first gave sanction by Maine legislation for the release of a debtor held on execution through the medium of a poor debtor's oath.

The opinion concedes, following declaration that estab-

lished law rendered all action unnecessary, that subsequent to our statehood "our legislature took care of the subject by statute." Five enactments are cited. The first is Chapter 122 of the Statutes of 1821, Sec. 13, but this relates solely to the release of an imprisoned debtor having the status of a pauper, and P. L. 1831, Chap. 520, deals only with the release of persons imprisoned for debt by operation of law, i.e., through disclosure and oath. It is only in two of the three remaining instances that the legislature dealt with the release of an imprisoned debtor by the voluntary action of his creditor, P. L. 1822, Chap. 209, Secs. 27 and 28 (the latter of which like Stats. 1821, Chap. 122, Sec. 13, applied only to paupers) and P. L. 1828, Chap. 410, Sec. 3, except that the fifth act cited, P. L. 1835, Chap. 195, provided again in Section 15 for the release of pauper debtors. The sections which dealt with paupers were long since repealed and it is manifest that in both cases where provision was made for the voluntary release of a debtor who was not a pauper the legislative intent was to impose a definite requirement that the releasing creditor who desired to retain the validity of his claim against the debtor's property must proceed by a *written permission.* This last law, like that of 1831, provided for releases other than by a creditor's consent, and Section 12, the "specific provision" of which is quoted in the opinion, in its original enactment, as in R. S. (1841), Chap. 148, Sec. 42 (when it last appeared in our statutes), bore not even a remote connection with such releases as were made by the voluntary action of a creditor. It is here more than anywhere else, in my view, that the majority opinion misconceives our legislation on this subject matter and the litigation that has arisen under it. The majority opinion quotes at length from *Jones* v. *Jones,* 87 Me., 117, 32 A., 779, including the statement that our law stood just the same, following the enactment of P. L. 1835, Chap. 195, as prior thereto and that it was unchanged when R. S. (1841), Chap. 114, Sec. 42 was omitted from the revision of 1857. There can be no doubt on either

point so far as the release of a debtor imprisoned on execution is accomplished by operation of law, but no release by volition of the creditor was involved in either the *Jones* case or in *Spencer et al.* v. *Garland*, 20 Me., 75, cited therein, where the distinction between such a release and one by operation of law was clearly drawn. Our Court has never recognized it as a principle of the common law that imprisonment of a debtor satisfied the debt on which he was imprisoned, but it has heretofore uniformly declared that at common law arrest or imprisonment coupled with voluntary release did that very thing. So long as creditors were holden to pay the board of the debtors they had caused to be confined who were not merely debtors but paupers, legislation authorized their release without formality and with the creditor's claim unimpaired so far as property was concerned, but there has never been a time when Maine has seen the semblance of sanction in legislation whereby an imprisoned debtor who was not a pauper might be orally released by his creditor without elimination of the debt except in the short interval between the statutory revisions of 1841 and 1857 and that semblance was more apparent than real.

R. S. (1841), Chap. 148, Sec. 61, reads:

> "Whether such indorsement be made on the executions or not, the judgment, on which the same was issued, may be revived or continued in force with the said exception, by an action of debt, or on scire facias to be brought, as in other cases of judgment."

There is no suggestion in the revision that this provision was contained in our 1821 statutes or that it was founded on legislation enacted between 1821 and 1840. Nor was it. If R. S. (1841), Chap. 148, Sec. 61 was still in effect, it might be claimed that the present decision is rendered under it because of the express recital that regardless of the indorsement required by what is now R. S. (1930), Chap. 124, Sec. 61, or the lack of it, a judgment might be revived or kept in force, although the

common sense interpretation of it would seem to be that provided the facts were such as to make indorsement within the statute proper, the lack thereof would not be fatal. In the present case the deficiency is not the lack of an endorsement but the fact that no *written permission* was given for the release. The creditor did not fail to secure the formality required by Section 61. He failed to meet the condition requisite imposed by Section 60 which would have entitled him to obtain such an indorsement. Interpretation of that section, however, cannot be said to be involved for if we assume that it became a part of our law by the action of the revisors in 1841 in writing it into the chapter without the sanction of earlier legislation, we must grant that it was repealed with equal efficiency when the revisors in 1857, by implication at least, restricted the availability of keeping the judgment alive to those cases where a certificate of the cause of the debtor's discharge was in fact indorsed on the execution, or where the facts would justify an indorsement, if requested, R. S. 1857, Chap. 113, Sec. 34.

The decision can draw no present support from recital in the opinion that:

> "It would be illogical to hold that a discharge of a debtor on the oral direction of the creditor would amount to a satisfaction of the debt, if the creditor could accomplish the same result without discharging the debt merely by failing to provide for the support of the debtor in jail"

because the alternative method of discharging a debtor has not been available since the statute revision of 1857. It may in fact have been unavailable since the enactment of P. L. 1842, Chap. 23, which made written complaint by the imprisoned debtor that he was unable to pay the expenses of supporting himself in prison a prerequisite to demand on the creditor therefor. I quote the comment, however, not merely to show the antiquity of its availability, but to record definitely that if it implies assumption that this Court may pass upon the logic

of legislation generally or interpret R. S. (1930), Chap. 124, Sec. 60, as if the word "written" did not appear therein because the requirement of a writing would be *illogical,* I am not only unable but entirely unwilling to subscribe thereto. With the logic or the wisdom of governmental policy as fixed by the legislative department of government, the judicial department has no concern and it should avoid with scrupulous care even the semblance of interference.

The foregoing is based on assumption that the majority opinion is grounded in an interpretation of R. S. (1930), Chap. 124, Sec. 60, which disregards entirely the word "written." Such is the distinct trend of the language used until attempt is made to distinguish judgments from the executions issued thereon. If this attempted distinction is presented as an alternative ground, it seems to me equally untenable although it may be said for it that it involves no attempt at such a bold usurpation of legislative power as definitely ignoring the statutory word "written." It is accomplished by reference to five cases decided in this Court and the grouping of them into two classes. *Miller et al.* v. *Miller,* 25 Me., 110, and *Clement et al.* v. *Garland,* 53 Me., 427, are said to involve the validity of executions and the claim is asserted that R. S. (1930), Chap. 124, Sec. 61, relates to nothing more, whereas *Spencer et al.* v. *Garland,* supra, *Moor* v. *Towle,* 38 Me., 133, and *Jones* v. *Jones,* supra, are declared to have been decided on the ground that they presented actions of debt on the judgments involved. It ought to be sufficient answer to this claim of distinction so far as the *Spencer* and *Jones* cases are concerned that it was not drawn in either of them and that neither presented facts showing the release of an imprisoned debtor by the voluntary action of his creditor. Neither was decided on the principle that an action of debt would lie on a judgment under which an execution, earlier used to imprison the debtor, had lost its force as a precept. Both declared that arrest followed by discharge through the filing of a bond left the creditor free to proceed

against the debtor's property. P. L. 1835, Chap. 195, was construed in both cases and what is now R. S. (1930), Chap. 124, Sec. 60 in the latter. This would have been entirely unnecessary if its provisions were applicable only to executions, but it may be said further that our court as constituted when all of these decisions were handed down drew no distinction whatsoever between a judgment and an execution issued thereon. In the *Spencer* case it is stated that a voluntary discharge "might operate as a satisfaction of the judgment" (not an execution), and in the *Jones* case attention is centered on the contention that "the judgment was satisfied" (not the execution). The same is true of the *Miller* and *Clement* cases, both of which refer to the common law principle concerning "satisfaction of the debt." The *Moor* case it should be noted deals with an action of debt on a judgment instituted before the debtor was imprisoned.

The statements quoted from our own decisions all relate to the common law principle regulating the rights of a creditor against his debtor after resort to imprisonment in an attempt to collect his debt, which is the very situation presented by the instant case and with which the statute interpreted was intended at the time of enactment to deal. Our problem most certainly is determination of the extent to which the common law has been changed by legislation, and in the *Miller* case the view was recorded that since the legislature had provided a remedy for the common law principle developed when there was no machinery by which an imprisoned debtor might secure his release, it would be "improper for the Court to attempt to provide" therefor in some other manner.

Massachusetts and Vermont have modified the rule of common law in manners not consistent with each other or with that applicable in Maine. Neither has a law comparable with our own R. S. (1930), Chap. 124, Sec. 60. In Massachusetts it has been the law "ever since debtors were permitted to be discharged from imprisonment on taking the poor debtors' oath"

that the judgment remains in full force. *Cheney et al.* v. *Whitely*, 9 Cush., 289; *Raymond* v. *Butterworth*, 139 Mass., 471, 1 N. E., 126. The first of these cases records that a judgment creditor may sue on his judgment "even whilst the debtor is in confinement . . . discharging him from imprisonment within seven days." Vermont has made special provision for the very situation presented in the instant case. There it is provided by statute that the release of an imprisoned debtor by his creditor upon a "promise to pay the debt" has no effect thereon. *Willard* v. *Lull*, 20 Vt., 373. These decisions of the courts of our neighbor jurisdictions are all cited in the majority opinion. The Vermont case also declares:

> "if it were not for the statute, he (the creditor) would have no farther remedy; and with that, he can only have the remedy which the statute gives."

At common law the plaintiff herein having caused his debtor to be imprisoned on execution, and given consent to that debtor's release, was barred from later attempt to collect either on the execution used to effect the imprisonment or on the judgment under which the execution was issued. The legislature has said, in the only enactment dealing with such a situation which stands unrepealed upon our statute books, that if the discharge of the debtor was accomplished by a *written permission* the effect is the same as if the discharge had been through disclosure. No further or other provision applicable to the circumstances has been contained in our law for more than four score years. It seems to me to be pure fiction to say either that no legislation is necessary to authorize a creditor in the position of this plaintiff to maintain an action of debt on a judgment already used, via an execution issued thereon, to imprison his debtor, or that R. S. (1930), Chap. 124, Sec. 60 (the provisions of which trace back to P. L. 1822, Chap. 209, Sec. 27 and P. L. 1828, Chap. 410, Sec. 3) may be interpreted, because of inconsistency with a law or laws effective in Massa-

chusetts when this State was separated from it, or with some other provision enacted concurrently (which could relate only to the 1822 law where Sec. 28 authorized the release of a pauper without formality), or because any law, especially any law since repealed, was on our statute books when it was originally enacted, as if the word "written" did not appear therein.

RINALDO A. L. COLBY

vs.

JESSE TARR AND DEPOSITORS TRUST CO., TRUSTEE.

Sagadahoc. Opinion, March 15, 1944.

Damages. Evidence. Exceptions. General Motion.

The question of the correctness of the ruling of the presiding justice in awarding triple damages after a verdict for actual damages had been returned by the jury should be raised by exception, not by general motion.

Introduction in evidence by the defendant of a check drawn by him payable to the plaintiff and cashed by the plaintiff was proper, the check having probative force to prove sale.

Evidence of a conversation between the plaintiff and a third person had upon the delivery of a check payable to and cashed by the plaintiff tending to show that the check was not given or accepted as a consideration for the sale of trees to the defendant was admissible.

Testimony of two witnesses as to the conversation which took place at the time of the delivery of the check tending to rebut the claim that the check was given as a consideration for the sale of trees was admissible.

Evidence offered by plaintiff of a conversation between the plaintiff and defendant's alleged employer, which conversation contained statements favorable to the plaintiff, was inadmissible in that the statement by the plaintiff

was self-serving and that the statement by the alleged employer was by one without authority from the defendant to speak for him and was not made by a joint tortfeasor at the time of and in furtherance of a wrongful act.

The deposition of a third party to the effect that he had delivered a message from the plaintiff to the defendant was not competent evidence.

ON EXCEPTIONS AND GENERAL MOTION.

Action of quare clausum alleging that the defendant had entered upon lands of the plaintiff and cut growing trees. The defendant claimed that the plaintiff had sold the trees upon the land to the defendant. The plaintiff claimed that no agreement for such sale was concluded. The defendant claimed that an agreement was reached for the sale and that it was in pursuance of that agreement that he entered upon the land and cut trees. The case was tried before a jury and testimony of probative force was presented in behalf of the contention of each of the parties. The jury brought in a verdict for the plaintiff and assessed actual damages. Upon motion of the plaintiff the presiding justice rendered judgment for three times the amount of the verdict. The defendants by general motion raised the question as to the correctness of the awarding of triple damages by the presiding justice and filed exceptions as to the admissibility of certain evidence presented. The Court held that the defendants had not followed the proper method to raise the question of the correctness as to the award of triple damages but, because of errors in admitting some of the evidence objected to, the entry would be Exceptions sustained. The case fully appears in the opinion.

McLean, Southard & Hunt, for the plaintiff.

Edward W. Bridgham,

Harold J. Rubin, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHAPMAN, J. The plaintiff in his writ alleged that the defendant broke and entered the plaintiff's close and there committed trespass and damaged the real estate by cutting trees growing thereon. The case is here on the defendant's general motion and exceptions. In his motion the defendant claims that the verdict in favor of the plaintiff was not warranted by the evidence and that excessive damages were awarded. The exceptions raise the question of the admissibility of evidence admitted over the objection of the defendant.

The plaintiff owned a tract of land upon which there were two groves of oak trees. Negotiations were had between the plaintiff and defendant relative to the purchase of the trees and the plaintiff contends that he offered to sell the trees in one of the groves to the defendant, but that no agreement for such sale was reached. It is the contention of the defendant that an agreement was reached for the sale of the trees and that it was in pursuance of such agreement that he entered upon the lands and cut the trees. If the trees were sold by the plaintiff to the defendant no trespass was committed. If there was no sale the defendant's cutting of the trees was wrongful. The case was tried before a jury upon this issue and there was testimony of probative force presented in behalf of the contention of each of the parties. In such case the Court will not grant a motion to set aside the verdict of the jury. *Libby* v. *Heikkinen*, 140 Me., 23, 32 A (2d), 604.

The contention of the defendant as to excessive damages is based upon the claim that the presiding Justice erred in granting the motion of the plaintiff that he be awarded treble damages in accordance with R. S. 1930, Chap. 109, Sec. 11. The jury in its verdict assessed actual or single damages and, upon motion by plaintiff, the presiding Justice ordered judgment for thrice the amount of the verdict. A general motion raises question as to the correctness of the verdict of the jury. R. S., Chap. 96, Sec. 59. The assessment of treble damages upon the verdict

was by ruling of the presiding Justice and the question of its correctness should be raised by exception. *Stephenson* v. *Thayer*, 63 Me., 143. See also *Black* v. *Mace*, 66 Me., 49.

The exceptions presented by the defendant are six in number.

Exception No. 1. The plaintiff was permitted, against the objection of the defendant, to testify as to a conversation with Miss Blanche Stevens. There was introduced in evidence by the defendant a check signed by Miss Stevens, payable to the plaintiff, for $140.25, bearing the notation on its face, "14.025 ft", and delivered to the plaintiff in behalf of the defendant. The defendant claimed that the check supported his contention that there was a sale of the trees from the plaintiff to himself, and it was admissible for that purpose. The question and answer as to the conversation were as follows:

> "Q. Now will you tell us exactly what conversation took place at the time that the check was made out?"

Objection was interposed by the defendant without specification of reasons therefor.

> "A. We went to Miss Stevens' home and she invited us in, and after the usual few minutes talk I stated my business. I said, 'I was down two or three nights waiting. You didn't come and I came out to see you. I wanted to know what you are going to do about these logs.' She said, 'Mr. Tarr told me to give you a check for the logs up at the top of the hill, those cut in the grove.' So she wrote this check and passed it to me. I looked at the check and I said, 'That is for the payment of the logs only; that doesn't include the damage,' and she said, 'No, that will be taken care of later', and I said 'You know that I give no permission to do that,' and she says, 'That is right. He done wrong and he knows it.' "

Those statements in the conversation that referred specifically to the check were admissible to show for what purpose the check was given. We so held when the case was previously before us. *Colby* v. *Tarr*, 139 Me., 277, 29 A (2d) 749. At that time the record did not show that the answer contained the statements, "You know that I gave no permission to do that," and "That is right. He done wrong and he knows it." These additional statements were also admissible. It was the contention of the defendant that the check was the consideration for the sale of the trees and that the acceptance of the check by the plaintiff was an acknowledgment on his part that there had been such sale. The acceptance of the check had probative force in this respect and statements inconsistent with such an acknowledgment made at the time of the delivery of the check and as a part of what was taking place, were competent evidence to rebut the contention of the defendant. The rule is well stated in *State* v. *Walker*, 77 Me., 488, 491, 1 A., 357. See also Wigmore on Evidence, Sec. 1777; *Stewart* v. *Hanson*, 35 Me., 506; *Stevens* v. *Miles*, 142 Mass., 571, 572, 8 N. E., 426. The exception is not well taken.

Exception No. 2. The plaintiff was permitted, against the objection of the defendant, to testify to a conversation on another occasion between himself and Miss Stevens. The question and answer were as follows:

> "Q. What conversation did you have with Miss Stevens at that time?"
>
> "A. I said, 'Do you know your man has been in there and cut those trees down?" She says, 'Yes, I know it and I stopped him.' She said, 'He had no business there and I told him to go and see it and make things right.' "

The question and answer had no relation to the check which was referred to in exception number one and was objectionable, but, at the request of the defendant, the Court ordered stricken out all of the answer except that part which stated that the

defendant had cut the trees. The fact that the defendant had cut the trees was not in dispute. The answer, therefore, as it remained after the direction of the presiding Justice, was not prejudicial. The exception is not well taken.

Exception No. 3. The plaintiff, against the objection of the defendant, was permitted to introduce the deposition of one William Chenery. It was the claim of the plaintiff that when he found that the defendant was cutting trees he sent a message ordering him to cease cutting and that the defendant did so. The deposition was to the effect that the deponent had delivered the message from the plaintiff to the defendant ordering him to cease cutting. The message of itself was not competent evidence. It was admissible only if it had elicited from the defendant a response by word or act that would tend to discredit his claim that he was rightfully upon the property. There is no evidence of such conduct on the part of the defendant. Neither in the deposition nor otherwise is the date of the delivery of the message disclosed. There is nothing to show that it was delivered before he had finished the operation. The objection in behalf of the defendant was valid.

Exception No. 4. Miss Pauline Nute was permitted, against the objection of the defendant, to testify to another conversation had between the plaintiff and Miss Stevens on the streets of Gardiner. The question and answer relative to the conversation were as follows:

> "Q. Now will you tell us just what happened and what was said?"
>
> "A. Mr. Colby inquired of Miss Stevens about the cutting and told her that he had not given Mr. Tarr permission to cut on the camp ground, and she said that she knew it, that she had stopped him from cutting."

This conversation had no relation to the check referred to in exception number one and must be considered entirely upon the question as to whether the statements were competent evi-

dence to prove the facts therein set forth. The statement of Mr. Colby, the plaintiff, was objectionable in that it was self serving. As to the statement of Miss Stevens, it is contended by counsel for the plaintiff that evidence in the case discloses that she was the employer of the defendant and that he did the cutting as her foreman and under her direction and that, consequently, the statement by Miss Stevens was admissible against him. Aside from the question as to whether evidence in the case disclosed such relationship and concert of action as claimed by the plaintiff, there is no rule of evidence that makes the statement of an employer admissible against an employee accused of wrongdoing, by reason of that relationship alone. Nor would the statement be admissible on the ground that they were joint tort-feasors. It was still objectionable because it was not made during the time when they were engaged in committing the alleged wrongful act and in furtherance thereof, but at a time subsequent thereto. 3 *Greenleaf on Evidence,* 94; *Strout* v. *Packard, et al,* 76 Me., 148, 49 Am. Rep. 601; *Royal Insurance Co.* v. *Eastham,* 71 Fed. (2d), 385, certiorari denied, 293 U. S., 557, 55 S. Ct., 110, 79 L. Ed., 658. The statement of Miss Stevens was objectionable for another reason: It was an expression of the opinion of the witness as to the wrongdoing of the defendant. *Chamberlayne's Modern Law of Evidence,* Sec. *1342; Boston & Maine R. R. Co.* v. *Ordway,* 140 Mass., 510, 5 N. E., 627. The exception is well taken.

Exception No. 5. Miss Pauline Nute was permitted, against the objection of the defendant, to testify to the conversation had been between Miss Stevens and Mr. Colby at the time of the delivery of the check hereinbefore referred to. The issue involved is the same as that involved in Exception No. 1. The exception is not well taken.

Exception No. 6. Mrs. Fannie Colby was likewise permitted to testify, against the objection of the defendant, to the conversation between Miss Stevens and Mr. Colby at the time of the delivery of the check. The issue involved is the same as

that involved in Exceptions 1 and 5. The exception is not well taken.

The defendant has not shown the right to relief under his motion, but because of errors disclosed in Exceptions 3 and 4, the entry must be

Exceptions sustained.

RUTH F. RAMSDELL, ADMINISTRATRIX

vs.

ARNOLD J. BURKE.

Cumberland. Opinion, March 18, 1944.

Reference and Referees. Presumption in case of Death. Inferences.

The statute, R. S. 1930, Chapter 96, Section 50, by explicit terms creates a presumption of due care by a deceased person at the time of all acts in any way related to his death or injury, which makes a prima facie case for the plaintiff bringing action for damages for the death of such deceased person with respect to the decedent's due care.

To sustain a finding that the decedent was guilty of contributory negligence and to rebut the presumption of due care on the part of the decedent it must be shown that there was evidence of probative value that the defendant had sustained the burden of proof of such alleged contributory negligence.

Decisions may be based upon inferences properly drawn, but such inferences must be drawn from facts proved in the case and not merely upon conjecture or guesswork. Mere possibilities will not sustain a legitimate inference of the existence of a fact.

Findings of fact by a referee are final only if there is any evidence of probative value to support the finding.

ON EXCEPTIONS TO CONFIRMATION OF REPORT OF REFEREES.

Action for damages for the death of plaintiff's intestate. Decedent came to his death by reason of injuries received by being struck by defendant's automobile as he was crossing Brighton Avenue in Portland on foot. The action was based on the presumption of due care by a deceased person. The defendant did not see the decedent previous to the accident and there were no other witnesses of the accident, and no direct or positive testimony as to the action of the decedent at the time of or just previous to the accident. The case was referred and the referees found for the defendant. Their report was confirmed by a justice of the Superior Court. The plaintiff excepted. Exceptions sustained. The case fully appears in the opinion.

Milan J. Smith for the plaintiff.

William B. Mahoney,

James R. Desmond, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MANSER, J. This case comes forward on exceptions to the confirmation of a report of referees by a Justice of the Superior Court. The action was brought under the so-called death liability statute, or Lord Campbell's Act, R. S., 1930, c.101, §§ 9, 10. It was heard by referees who found for the defendant, and judgment was rendered in his favor.

Henry F. Ramsdell, the intestate, came to his death by reason of an automobile accident occurring September 24, 1941. On the evening of that day he was afoot, crossing Brighton Avenue in Portland, as a point near its intersection with Capisic Street, when a collision occurred with the automobile driven by the defendant. Ramsdell died two days later without

conscious suffering. Upon the question of proof of liability under such circumstances, R. S., c.96, §50, has application. It reads as follows:

> "In actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant."

The effect of this statute is important in connection with the record here presented. The legislation is in consonance with public policy. In an action between living parties, the plaintiff would be required to prove that he was in the exercise of due care and that no want of care on his part contributed as a proximate cause of the accident. When, however, his lips are sealed in death, his version of the accident is not available. Neither can he deny nor explain evidence offered by the defendant.

The statute, by its explicit terms, creates a presumption as to the due care of the deceased person "at the time of all acts in any way related to his death or injury," which obviates the necessity of proof in his behalf and makes a prima facie case for the plaintiff with respect to the decedent's own due care.

The statute then adds:

> "If contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant."

Such defense was pleaded.

The evidence would warrant the conclusion that the deceased had reached a point in the street about 15 feet from the sidewalk. A concave indentation was found, about the size of a small soup plate, at the front of the right fender, but there

was no definite testimony as to when the dent was made. The defendant had purchased the car the same day, and testified that he did not then notice whether there was such indentation.

The first knowledge that the defendant and his passenger had of the accident, was when the body of the deceased came or rolled up over the hood by the windshield. These two witnesses estimated that the car was being driven from 20 to 25 miles per hour. The defendant said he immediately veered to the left, jammed on his brakes and went about 20 feet. He also said that the brakes were working properly.

The basis of the finding by the referees, as stated in their report, was that the deceased was guilty of contributory negligence. It inferentially appears that they found negligence on the part of the defendant, and applied the rule repeatedly stated in our decisions that a person is barred from recovery for the negligence of another when his own want of due care contributed to the injury.

No witness saw the deceased as he proceeded from the sidewalk into the street. One man saw him walking across the filling station yard at the corner of Capisic Street and Brighton Avenue, but he says nothing as to seeing the defendant's car approaching at that time, and knew of no danger until he heard the bump of the collision. There is no evidence as to the distance the defendant's car was from the deceased when he started across Brighton Avenue. There were two street lights in the near vicinity, both of 250 candlepower. The record is silent as to facts showing whether in the exercise of reasonable care, the deceased had or had not the right to assume there was time and opportunity to cross in front of the car.

To sustain the finding of the referees, it must be shown that there was evidence to rebut the presumption of due care on the part of the deceased, and to justify the conclusion that the defendant had sustained the burden of proof as to contributory negligence.

Presumptions of law and so-called presumptions of fact in favor of a party to litigation, are of many varieties and characteristics. An exposition relating thereto may be found in *Watkins* v. *Insurance Co.*, 315 Pa., 497; 173 A. 644; 85 A.L.R., 869. The presumption here created by statute is definite and explicit.

There was no direct or positive testimony as to the conduct and action of the deceased, except that he was walking towards Brighton Avenue which he evidently undertook to cross.

Decision may, of course, be based upon inferences properly drawn, but such inferences must be drawn from facts proved in the case, and not merely upon conjecture or guesswork. *Cooledge* v. *Manufacturing Co.*, 116 Me., 445, 102 A. 238.

An inference can be drawn only from facts, and mere possibilities will not sustain a legitimate inference of the existence of a fact. 23 C.J., Evidence, §1795, 32 C.J.S., Sec. 1042.

> "When it is sought to establish a case by an inference drawn from facts, such inference must be drawn from facts proved. It cannot be based upon a probability." *Alden* v. *Railroad Co.*, 112 Me., 515.

> "When it is sought to establish a case upon inferences drawn from facts, it must be from facts proven. Inferences based on mere conjecture or probabilities will not support a verdict." *Mahan* v. *Hines,* 120 Me., 371 at 378.

> "In the absence of evidence, the mere possibility which exists in every case, that the plaintiff (decedent) may have been guilty of negligence, cannot be made the basis of a ruling against him." *Manor* v. *Gagnon,* (N. H.) 32 A. 2d, 688.

To sustain exceptions, the excepting party must show that the findings of fact by the referee are not sustained by the evidence. *Hovey* v. *Bell,* 112 Me., 192, 91 A., 844.

When the decisions state that the findings of fact by a referee are final, if there is any evidence to support them, it must always be understood that the evidence is of probative value. As said in *Jordan* v. *Hilbert,* 131 Me., 56, 158 A., 853, 854,

> "The finding of fact by the Referee . . . was properly accepted in the Trial Court as final. It was supported by evidence of probative value."

It is argued by the defendant that the case of *Bechard, Adm'x.* v. *Lake,* 136 Me., 385, 11 A., 2d, 267, has application as to the present factual situation, but that case is clearly distinguishable. There, positive physical facts were of record, which are entirely lacking in the present case. Among them was one of significance as compared with the circumstances here. It was that the deceased emerged upon the highway from comparative obscurity, because of night darkness, cloudy sky and rain, into the pathway of an automobile on its own right hand side of the street. Here, the only evidence is that the deceased was struck when 15 feet from the sidewalk where he could be clearly seen. The driver did not veer to the left until after the impact. There is nothing to show that the body was carried any distance at all by the car. It is not a reasonable inference from any proven facts to assume that the deceased was negligent when he had arrived at a point where he was beyond the danger of being struck by a car which had ample opportunity to proceed on the right hand side of the street.

Exceptions sustained.

BARBARA WILSON, PETITIONER *vs.* CLARENCE WILSON.

Androscoggin. Opinion, April 3, 1944.

Divorce. Alimony. Doctrine of Stare Decisis.

The law of divorce, including payment of alimony, in this jurisdiction is wholly statutory.

Under the divorce statute of this State, a husband cannot be compelled without his consent, to provide alimony or support for a wife against whom he has obtained a divorce for her fault.

The Superior Court, being invested with jurisdiction in reference to alimony, there is nothing whereby parties are prohibited from entering into a proper agreement in reference thereto, or the Court from rendering judgment in accordance with a noncollusive agreement of the parties which they have seen fit to make.

The doctrine of *stare decisis* should prevail where the overruling of a prior decision would create uncertainty, litigation as to orders theretofore made in reliance thereon and tend to defeat justice.

In the instant case, the adjudgment below that the respondent was in contempt was in effect a denial of his motion to dismiss the contempt petition.

ON EXCEPTIONS BY THE RESPONDENT.

Petition to have the respondent adjudged in contempt for failure to pay alimony as ordered in a decree of divorce. The divorce action was brought by the husband, respondent herein, and obtained by him. The parties had entered into an agreement that the husband pay alimony. Included in the divorce decree was an order for payment of alimony by the husband in accordance with the terms of the agreement. The respondent failed to pay alimony as ordered in the decree. In the Superior Court the respondent was adjudged in contempt for his failure to pay. Respondent excepted. Exceptions overruled. The case fully appears in the opinion.

John G. Marshall, for the petitioner.

Seth May, for the respondent.

SITTING: STURGIS, C. J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. The respondent excepts to a ruling by a Justice of the Superior Court adjudging him in contempt for failure to pay alimony as ordered in a decree of divorce obtained by him against the petitioner herein. The exceptions are based on two grounds: first, that the Court below did not rule upon his motion to dismiss the petition seeking to have him adjudged in contempt, and second, that the order for payment of alimony was void.

Ground One. It need be stated only that the adjudgment of the respondent in contempt was in effect a denial of the respondent's motion to dismiss the petition. In the recent case of *Lebel* v. *Cyr,* 140 Me., 98, 34 A. (2d), 201, we said on page 202 (analogously to the situation here): "However, the effect of the granting of the plaintiff's motion for default was to deny in fact the defendant's motion."

Ground Two. If the alimony order in his divorce decree were void, failure to comply with it would not found contempt. *Call* v. *Pike,* 66 Me., 350, 354.

The respondent contends rightly that the law of divorce in this jurisdiction is wholly statutory, *Jones, Appellee* v. *Jones, Appellant,* 136 Me., 238, 241, 8 A., 2d, 141; *McIntire* v. *McIntire,* 130 Me., 326, 335, 155 A., 731; *Stratton* v. *Stratton,* 77 Me., 373, 377, 52 Am. Rep., 779; *Henderson* v. *Henderson,* 64 Me., 419, 421; and, claiming that our divorce statute (R. S. 1930, Chap. 73) contains no authority to grant alimony to a wife from whom the husband obtains a divorce, insists that lawfully there may be no such order, even though it is inserted in his decree with his consent and in accordance with their agreement. Herein neither the agreement nor its inclu-

sion in the decree by his consent is controverted. Likewise there is no claim of collusion.

We consider *Stratton* v. *Stratton,* supra, controlling on this issue. Our divorce statute then was the same in effect as now, so far as this question is concerned. In that case as in this, included in the husband's decree for divorce against his wife was an order for payment of alimony by him to her in accordance with their noncollusive agreement. While there was a cross-libel on which the wife also obtained a divorce (now divorce decrees may not be granted to both spouses, *McIntire* v. *McIntire,* 130 Me., 326, 155 A., 731), yet the alimony order was not inserted in her decree. The fact that it could have been did not lawfully prevent its inclusion in his decree, *he consenting thereto.*

In the *Stratton* case, supra, the question as stated by the Court was whether "it was beyond the jurisdiction of the court to allow alimony to the wife on the libel of the husband." It said: "This is undoubtedly true in cases where there is no waiver by the husband of his strict legal rights, and the decree is made in opposition to his will." In the case at bar it must be deemed that the presiding Justice found that the respondent waived his "strict legal rights" and the decree was not made "in opposition to his will.' The Court also stated on page 377:

> "But the court, being invested with jurisdiction in reference to alimony, there is nothing whereby parties are prohibited from entering into a proper agreement in reference thereto, or the court from rendering judgment in accordance with the agreement of the parties, which they have seen fit to make, as in other cases....
>
> "And by this, it should not be understood that we mean to hold that the consent of parties can give the court jurisdiction of the subject matter in controversy, where *no* jurisdiction has been conferred upon it by the legisla-

ture. But that when the court has jurisdiction of the general subject matter in controversy,—'power to adjudge concerning the general question involved,' . . . then the consent of the parties may authorize the court to render a valid judgment, in accordance with such agreement."

In the *Stratton* case, supra, the Court on page 378 distinguished *Henderson* v. *Henderson,* supra, 64 Me., 419; *Stilphen* v. *Houdlette,* 60 Me., 447; and *Stilphen* v. *Stilphen,* 58 Me., 508, and said:

"In those cases the court was called upon to decide as to the strict legal rights of the parties and where there had been no waiver, or agreement, as in the case at bar."

With reference to this holding in the Stratton case, supra, our Court in *Luques* v. *Luques,* 127 Me., 356, 360, 143 A., 263, 264, observed:

"Upon the first question raised" (want of jurisdiction) "and upon which counsel lays the greatest stress, no error is shown. It is true that, under the divorce statute of this state, a husband can not be compelled *without his consent* to provide alimony or support for a wife against whom he has obtained a divorce for her fault, . . . *Stratton* v. *Stratton,* supra, 77 Me., 376 . . . ."

(Italics ours.)

In Sec. 615, 17 Am. Jur., page 478, it is stated:

"It is a general rule, independent of statute, that permanent alimony will not be awarded to a wife from whom her husband obtains a divorce for her marital fault or misconduct, *except when particular circumstances may be deemed to justify it.*"

(Italics ours.)

It is difficult to conceive of more compelling particular circumstances justifying the employment of the exception to the general rule than when, with the parties before the Court, there is a noncollusive, court-approved agreement as to alimony, perhaps then acceded to by the husband because he believes that it is only fair and just that following the separation she have such support, which he is willing to provide, and especially when she may have no other means due to age, poor health, or some other cause. She may believe she could prevail in a contest, but desists in reliance upon his valid promise. He obtains his divorce. Afterwards he breaks his word. Should the Court shield him in such a reprehensible act and deny her the agreed-upon subsistence, because he obtained his divorce for her fault?

We realize that it our duty to declare law as is and not what it should be. But in this jurisdiction the law is *stare decisis* and the question is whether we shall now, after a lapse of nearly sixty years, change it. This we think we should not do.

In *Cota* v. *Ross*, 66 Me., 161, Chief Justice Appleton said on page 165:

> "The decisions of our highest tribunals are the only authority for the greatest part of our law. Nothing can more tend to shake public confidence in its stability than a disregard by the court of its previous adjudications. 'It is of less importance,' observes Ashurst, J., in *Goodtitle* v. *Otway*, 7 T. R., 395, 'how the law is determined, than that it should be determined and certain; and such determination should be adhered to, for then every man may know how the law is.' In Nixon's estate, 9 Irish, L. T. R., 32, Christian, L. J., declared: 'It is better that the law should be certain, than that it should be abstractly correct.' Unless we adhere to previous adjudications, we have nothing but oscillations in our decisions; and litigants can have no

certainty that the law of yesterday will be the law of tomorrow."

To overrule *Stratton* v. *Stratton,* supra, as interpreted in *Luques* v. *Luques,* supra, would be upsetting to practice, create uncertainty and litigation as to orders heretofore made in reliance thereon, and tend to defeat justice.

Exceptions overruled.

STATE OF MAINE *vs.* PARKER B. SMITH.

Androscoggin. Opinion, April 13, 1944.

Criminal Law. Embezzlement. Larceny. Indictment. Relevancy. Executors and Administrators. Evidence.

RESCRIPT.

The enactment of Sec. 10, Chap. 131, R. S. 1930, created a peculiar species of larceny where the felonious taking is wanting.

Where an executor's personal interests conflict with those of the estate, it is the duty of the executor to serve it with the same fidelity that one who has no conflicting interests would serve it.

An executor is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty, and may be removed.

Where a bailee has possession of bonds that belonged to a testatrix and qualifies as executor of her estate, he can not rightfully retain individual possession of them until a demand be made for their return, unless his right so to do is determined in proper proceedings.

One who voluntarily accepts an appointment as executor is estopped from treating his own indebtedness other than as an asset of the estate.

He must yield all controversy as to the debt due from himself and treat it as an asset of the estate.

Where a demand by an executor is necessary, he can not set up that no demand was made on him.

He may not be permitted to determine a controversy between himself as executor and himself as an individual.

An estate should be safeguarded against all conflicting, unadjudicated claims presented by an executor.

Qualification as executor estops him to deny the right of the estate to have immediate possession of property belonging to the estate, and he is duty bound to deliver such property to the legal representative of the estate, where his right to hold the same has not been judicially determined.

Under said Sec. 10, one may not be found guilty unless the conversion is fraudulent or he acted with felonious intent.

Where one, although he does that which he has no legal right to do, acts with an honest and well founded belief that he has such right, he cannot be found guilty under said Sec. 10.

Where subsequent acts, even though not in issue, tend to establish intent of the party in doing the acts in question, they are admissible.

A just verdict is not to be set aside because of a slight but comparatively harmless error in the omission or rejection of evidence.

Where knowlege or intent of the party is a material fact, evidence of other facts happening before or after the transactions in issue may be admitted, although they have no direct or apparent connection with it.

Such facts, if they tend to establish knowledge or intent, when that is material, although apparently collateral and foreign to the main issue, nevertheless have a direct bearing and are admissible.

Evidence of similar acts may frequently be relevant, especially in actions based on fraud and deceit.

An issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions or events, under the same, or substantially similar, circumstances.

That which tends to make the proposition at issue more or less improbable is relevant.

In cross-examination, the rule as to admissibility of evidence of a collateral matter is not applied with the same strictness, and great latitude is allowed the judge in the exercise of his discretion when, from the temper and conduct of the witness, such course seems essential to the discovery of truth.

In an indictment based on said Sec. 10, it is not incumbent upon the State to allege ownership of the property claimed to have been converted.

In an indictment based on said Sec. 10, it is necessary for the State to allege the delivery to and receipt by the accused of the property.

When an indictment employs language which makes clear and unambiguous the offense with which the respondent is charged, and enables him to comprehend fully the charges and make full defense to every allegation in the indictment, the indictment is sufficient.

Verbal inaccuracies, grammatical, clerical, orthographical, or syntactic errors, which are explained and corrected by necessary intendment from other parts of the indictment, are not fatal.

A denial of respondent's motion for a directed verdict and his appeal from the denial of the trial judge to set the verdict aside present like questions and accomplish precisely the same result.

While under Sec. 104, Chap. 96, R. S. 1930, it is the duty of the presiding justice to charge the jury orally or in writing upon all matters of law arising in the same, yet ordinarily advantage of such an omission so to do may not be taken unless, before the jury retires, the court's attention is called to such omission.

Rule stated as to when the court may review questions of law both on motion for a new trial and on appeal, even though exceptions were not taken.

On the appeal the only question for the Law Court was whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty.

On Appeal and Exceptions.

Action against the respondent for larceny under the provisions of Chapter 131, Section 10, R. S. 1930. The respondent was one of the executors of the will of Ella M. Foss, deceased. Previous to the death of Mrs. Foss the respondent had come into possession of bonds belonging to her which he alleged had been loaned to him by her with the right to use the bonds as collateral to secure funds to establish himself in business. After the death of Mrs. Foss and the appointment of the respondent as one of the executors of her will, he retained possession of the bonds and of the money received from the sale of some of them and of the call money of other bonds. He did not inform his co-executors of his alleged loan of the bonds by Mrs. Foss or of his dealings with the bonds until he learned that they were about to check the bonds in the Foss safe deposit box with a

list of the bonds owned by Mrs. Foss which they had obtained. The respondent was convicted of larceny under the above named Section 10. The respondent appealed and also filed exceptions. Exceptions overruled. Appeal dismissed. Judgment for the State. The case fully appears in the opinion.

Armand Dufresne, County Attorney,

Frank T. Powers, for the State.

Berman & Berman of Lewiston, for the respondent.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HUDSON, J. The respondent, convicted under R. S. 1930, Chap. 131, Sec. 10, comes to this Court on appeal and exceptions. This statute provides in part:

> "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny, and shall be punished accordingly."

By its enactment "a peculiar species of larceny" was created "where the felonious taking is wanting." *State* v. *Stevenson,* 91 Me., 107, 111, 39 A., 471, 472.

The indictment contained no counts for ordinary larceny and the presiding Justice instructed the jury that no conviction for such could be found, not only for its noninclusion, but because there was not sufficient proof of an original felonious taking of the property.

Although there were other counts in the indictment, the respondent was convicted only on Count 1 charging statutory larceny of twenty-five $1,000 Alabama Power Company bonds, hereinafter called Alabama bonds, and on Count 3 charging

the same of ten $1,000 Pennsylvania Electric Company bonds, hereinafter called Pennsylvania bonds.

While the record is voluminous, there was little conflict as to what was actually done by the respondent, but sharp issue was taken as to whether he acted either fraudulently or with felonious intent.

The defense was twofold: first, that the respondent did only what he had a legal right to do, and second, that if he had no such legal right, he acted in good faith, believing he had such, and possessed no felonious intent.

At the time of her death on December 11, 1941, these bonds were owned by Ella M. Foss, an elderly lady who lived in the city of Auburn. She left a testate estate of approximately $1,500,000, a large part of which consisted of securities.

For many years she had been well acquainted with the respondent, whose general business was that of banking. He had assisted her in her financial affairs and particularly with regard to the clipping and collection of her bond coupons. For some time, however, a Mr. Treat, whose business office was in Boston and who had been with E. H. Rollins and Sons, advised her as to investments and collected her coupons, receiving them either from the respondent or Mrs. Foss, and then remitted to her by check.

There was also a Mr. Comins of Dorchester, Massachusetts, a certified public accountant, who kept ledger accounts, anyway, of her bond transactions. Both Mr. Treat and Mr. Comins had complete lists of bonds owned by her at the time of her decease.

Mrs. Foss kept many, if not all, of her securities in her safety deposit box in the First National Bank in Auburn.

The respondent testified that in 1938 he and Mrs. Foss talked about his getting into some business with her financial assistance, but nothing was done about it until months afterwards following his investigation of some oil business in Texas. Then he claims that on May 5, 1939 she loaned him the Penn-

sylvania bonds with other securities, and later, on April 22, 1940, the Alabama bonds, also with other securities, with the right to use these bonds as collateral for loans he might make from banks and with the further right to use the money so obtained to establish himself in business.

The respondent also testified he gave receipts to Mrs. Foss on account of these two loans. They appear in evidence in State's Exhibits 7 and 9. Exhibit 7 reads as follows:

"Auburn, Maine
May 5, 1939.

"Received from Mrs. Ella M. Foss of Auburn, Maine, as a loan to be returned six months after demand, with interest, to be computed on the collateral value of the securities used the following securities:

"$10,000. Pennsylvania Electric Co., First & Re. Mort. 5% due 1962
10,000. Brooklyn Union Gas Co., General Mort. 5% due 1957
15,000. New England Tel. & Tel. Company First Mort. A 5% due 1952
15,000. Indiana Hydro-Electric Power Co., First Mort. 5% due 1958
$50,000. Total

Parker B. Smith"

Exhibit No. 9, dated April 22, 1940, is of like tenor and includes the $25,000 Alabama Power Company bonds. It also appeared that there were three other loans of securities claimed to have been evidenced by like receipts.

The total amount of all of these claimed loaned securities at par value was $451,000, of which it seems $58,000 were returned, so that on July 10, 1942, following Mrs. Foss' death, he owed the estate a balance at par of $393,000. However, we

are concerned particularly with the Pennsylvania and Alabama bonds, the statutory larceny of which he was convicted.

The respondent together with a Mr. Freeman and Judge Pulsifer were named executors in her will. They qualified January 13, 1942. At the time of her death the Pennsylvania bonds were pledged with the State Street Trust Company of Boston to secure his personal loan. The Alabama bonds, although they had been pledged previously, were then unpledged and were in his deposit box in a bank in New York.

The Alabama bonds, called for payment on March 10, 1942 at 101, were sent by him to Coffin & Burr for collection. The call money at his direction was used in the purchase for him of a like amount of Green Mountain bonds, which later he sold to Coffin & Burr, who sent two checks to him in payment therefor. Payment on said checks, however, was stopped because of a news item that appeared in a Boston paper, which raised a question with them as to his actual ownership of the bonds. Eventually these checks were paid following certain additional endorsements by the estate's executors and thus, according to the bill of exceptions, "The bulk of the proceeds of the sale of the Green Mountain Bonds was subsequently repaid to the Estate."

The Pennsylvania bonds likewise were called on April 11, 1942 at 105. They were withdrawn from pledge in the State Street Trust Company by the respondent on May 1, 1942, and sent in for collection. This call money was paid to him and he admitted that he used it in connection with his privately owned plastic business in Long Island, N. Y.

It also appeared that the respondent's co-executors, Freeman and Pulsifer, had no knowledge as to the claimed Foss and Smith agreement, or the above-mentioned receipts, or the disposition of the bonds and the use of the call money by him until some six months following their qualification as executors. On July 8, 1942, the co-executors, together with the respondent's secretary, Miss Parker, met at the First National

Bank in Auburn (Mr. Smith not then being in town) and opened the Foss deposit box, to which Mr. Freeman had the key. They then were led to believe that some bonds were missing. Two days later, on the tenth, they met again at the bank and this time Mr. Smith was with them. Freeman and Pulsifer had lists of the Foss securities which they had obtained from either Treat or Comins. On that day they were there to clip coupons to be sent in for collection. There then appeared clipped New England Tel. and Tel coupons produced by the respondent, but without any corresponding bonds in the box. Upon inquiry he said he had clipped these coupons by mistake the last time he was there. The co-executors expressed their intention to check the bonds in the box with their lists, whereupon, they testified, the respondent sent his secretary out of the room, saying she knew nothing about something he was going to tell them. Immediately, taking his brief case, he went into another room in the bank, but returned a short time later with his case and some envelopes in his hand, in one of which envelopes, so the co-executors said, the receipts were enclosed. The respondent, however, testified that he left the room to get some carbon paper and that he sent his secretary out to complete the detail of making up the certificates preparatory to sending the coupons in for collection. He denied that he brought back the receipts in those envelopes, but said in effect that on that day in their presence he had taken the envelope containing the receipts out of the deposit box. Anyway, it was then for the first time the respondent told his co-executors that Mrs. Foss had loaned him any bonds and that he had receipted for them, and this information was not divulged until he knew they were about to check her bonds with their lists. Even then he did not tell them that he had already collected the call money on the Alabama and Pennsylvania bonds and had spent it for his own benefit.

The respondent did not deny that he withheld this information, but attempted to excuse it by asserting that he desired to

use the proceeds of the Pennsylvania bonds to protect his plastic business in which he then had great faith, so that in due time, with orders from the General Electric in mind, he could pay up his total indebtedness to the banks and then return the securities to the estate. He testified that he thought that he had the same right to use the call money from the Pennsylvania bonds that he had under the agreement with Mrs. Foss to pledge the bonds.

He also testified that once in 1938 or 1939, when Mrs. Foss was in Florida, he talked with her in regard to the use of call money. Of this conversation he said:

> "If any bonds were called while she was away I could use the proceeds, pending her return, when the matter would be adjusted or new collateral take the place of the called bond."

The jury could have found that the arrangement had by him with Mrs. Foss, if there were such and if the receipts were actually given, was that he could only *pledge* the bonds as collateral for loans of money obtained by him, such loaned money to be used by him for his own purposes in establishing himself in business, with this exception, that if any bonds were called while she was away from home, he could collect the call money, use it for his own purposes, and then adjust with her upon her return home. But this call money in both instances was collected following her death.

The State contended that of the facts proved by it to show fraud and felonious intent the following were salient: when on May 12, 1942 he sent the Pennsylvania bonds in for collection and remittance, together with the ownership certificate, he stated in the certificate that he was the owner of the bonds and did not disclose any rights of the Foss estate to the same, although the certificate form stated, "A fiduciary must disclose the name of estate or trust"; he did not want his private secretary to have knowledge as to what he had done with the Foss bonds; had

she remained in the bank when he sent her out she might have heard him make some statement that she knew was untrue; once he made a report to Mr. Comins that he had deposited Federal Land Bank bond coupons to the value of $375.00, when in fact the coupons so deposited were in the amount of $210.00 and the balance was in cash; he concealed from his co-executors the loss of eleven of the Federal Land Bank as well as ten of certain Argentine Republic bonds; and he admitted that any interruption of his privately owned business at the time of the alleged fraudulent conversions would have spelled disaster to such business.

Two issues were raised: first, did the respondent have a legal right to do what he did? If he did, he would not be guilty. Second, if he had no such legal right, did he act fraudulently or with felonious intent, for if not he could not be found guilty?

Of the exceptions taken, seventeen in number, 1, 2, 3, and 13 were expressly waived.

Exceptions 7, 8, 9, 10, 11, *and* 16

These were taken to instructions in the Judge's charge. The defense claimed that the relationship between Mrs. Foss and the respondent was contractual; that the loan of the bonds in each instance was in the nature of a bailment; that until the bailment was legally terminated, he had a right as bailee to do what he actually did with the bonds; and that neither the death of Mrs. Foss nor his qualification as executor put an end to his rights. It contended that his lawful possession as bailee continued in him as an individual, that the bonds did not come into his possession as executor because the bailment had never been terminated, and therefore he could not be found guilty under the statute on which the indictment was drawn. It claimed further that there was no obligation to return the bonds until six months after demand and that no demand had

been made before the date of the alleged fraudulent conversions or embezzlements.

The essential parts of the instructions excepted to are:

1) "And I instruct you now, as a matter of law, that when this man became executor, had qualified as executor of this elderly lady, that, as a matter of law, the title of all of her personal property and bonds was transferred, the title to the personal property vested then in her executors of which this man was one. . . . And I instruct you, as a matter of law, that her executors had the right to possession."
2) " . . . his possession as an individual then became his possession . . . as an executor. He became a fiduciary, and it was his duty, with the others . . . it was his duty at her death to get possession of her property."
3) " . . . The law itself, no matter how he had obtained them, at that time changed the possession from him as an individual to him as an executor."
4) " . . . His duty was to gather those assets, just as it was the duty of the others. . . . If he had a lien on them, if he had a right to them of some sort, when they were gathered, that lien should be settled by the law and by the facts as they are."
5) " . . . It isn't his duty and it isn't his right to stand out representing her, as her fiduciary, to stand out with a claim consistent, beneficial to himself, inconsistent and not beneficial to the estate."
6) " . . . but I say it is the duty of a fiduciary in a claim which he has, if it is a claim against the estate and to the disadvantage of the estate, he should do one thing or the other. He should cease himself as an individual claiming against the estate, something against the estate. He should not be an executor. Or

> if he remains an executor he should not be claiming against the advantage of the estate something which is doubtful, at least. . . . He is there to guard the estate's interests, and if he has a claim, one concerning which there is a question, then he should not press it against the estate while he is executor, and, perhaps, rule on it when he has a right to not be executor. But at any rate, he cannot use advantages to his own interest against the estate, nor should he construe doubtful things in his own favor rather than the estate's favor."

Counsel for the respondent in their brief say:

> "We do not believe we are over-simplifying the issue by asking the question, had the respondent done in the lifetime of Mrs. Foss what he did after her death, could she have brought an action against him for conversion of the bonds?"

That, however, would not be the test here, for it omits that which is vital, namely, the respondent's qualification as one of the executors of the will. The presiding Justice we think, *on the facts herein,* correctly instructed the jury in effect that when he qualified as executor, he made an election. He swore allegiance to the estate. He could not serve two masters. Where his and the estate's interests conflicted, it was his sworn duty to serve the estate faithfully and with the same fidelity that one who had no conflicting interests would serve. "An executor or administrator is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty" and may be removed. *Putney* v. *Fletcher,* 148 Mass., 247, 248, 19 N. E., 370.

Thus, the respondent's decision to qualify as executor placed him in a position where he could not rightfully retain individual possession of the bonds until a demand were made for their

return, unless his right so to do were determined in proper proceedings.

True, as an individual he had certain rights under the agreement and they were not cut off simply by the death of Mrs. Foss. He could still have pledged the bonds loaned him until their return were demanded by the legal representatives of the estate and thereafter for a six months' period. But by his own decisive act (qualification as executor) he forswore the enjoyment of those rights unless and until his private rights were Court determined.

In *Hodge* v. *Hodge*, 90 Me., 505, 38 A., 535, 536, 40 L.R.A., 33, 60 Am. St. Rep., 285, it was held that a debt to a testator becomes by the debtor's appointment as executor an asset of the estate. Therein is quoted an early Massachusetts case, *Sigourney et al., Administrators* v. *Wetherell, et als.*, 6 Met., 553, 557, 558, as follows:

> "It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect, he now stands on the same footing with an administrator. But as an executor or administrator can not demand or receive payment of himself and can not sue himself, and yet is bound to account for his own debt, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as against the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid."

Also see *Ipswich Manufacturing Co.* v. *Story, Executor*, 46 Mass., 310, 313.

The law in *Hodge* v. *Hodge*, supra, has recently been reaffirmed in *United States of America, Appellant*, 137 Me., 302, on page 308, 19 A., 2d, 247, 249, where it is said:

"... when a person is appointed as the executor or administrator of an estate, who is himself debtor to the estate, the debt is not extinguished and such personal representative must account for the same as assets in his hands."

Speaking of *Stevens, Admr.*, v. *Gaylord,* 11 Mass., 256, a leading case on this subject, our Court in *Stewart* v. *Hurd,* 107 Me., 457, stated on page 460, 78 A., 838, 32 L.R.A.N.S., 671, Am. Cas., 1912D, 662:

"The doctrine of that case is the more logical and equitable one that neither in the case of testate nor intestate estates is the debt itself extinguished or released without payment, but the right of action is discharged or suspended because the executor or administrator cannot maintain an action against himself. Because of this impossibility of action, the rule was adopted that such indebtedness should be regarded as prima facie assets in the hands of such executor or administrator."

And later on page 461 of 107 Me.:

"Having voluntarily accepted the duties, pertaining to an executor or administrator, he is estopped from treating his own indebtedness other than as an asset of the estate. 'To allow him to accept the office and then to settle the amount which the creditors and others interested in the estate would have got had he not taken the office but had allowed some disinterested person to be appointed to enforce these rights, would not be doing justice to those whose rights the law undertakes to preserve.' *Bassett* v. *Fidelity and Deposit Co.*, 184 Mass., supra, at page 212."

It is also stated on page 212 in the *Bassett* case, supra, 184 Mass., 210, 68 N. E., 205, 100 Am. St. Rep., 552:

"But there is another side to the case. An executor or administrator is appointed for the sole purpose of enforc-

ing in behalf of those interested in the estate the rights of the estate against others. When the estate has a claim against the executor or administrator himself, he is incapacitated from performing that duty and taking to himself that office. For that reason, on broad principles of policy it was laid down by the common law of England *that he must yield all controversy as to the debt due from himself and treat it as an asset of the estate. No one is bound to accept the office, and if he elects to do so he thereby tacitly assents to this condition.*

"The common law did not allow him to accept the office and keep his rights in a controversy when his duty and his personal interest were in a direct conflict."
(Italics ours.)

In that case it was also stated on page 215, page 206 of 68 N. E.:

"Even if a demand had been necessary, the defendant cannot set up that no demand was made, as he seeks to do. It was his duty as executor to make a demand and he could not set up that he could not make a demand on himself."

The last quoted statement is pertinent here, inasmuch as the respondent claimed the right to retain possession of these bonds until a demand were made for their return. This case was cited with approval in *King* v. *Murray*, 286 Mass., 492, on page 495, 190 N. E., 526.

In holding as we do on this point, we feel that also as a matter of public policy we have taken the correct view. We are dealing with one's estate whose voice cannot now be heard. Such an estate should be safeguarded against all conflicting, unadjudicated claims presented by an executor. He should not himself be permitted to determine a controversy between himself as executor and himself as an individual.

From the date of his qualification on January 13, 1942, to the acceptance on September 8, 1942 of his resignation tendered on July 20, 1942, there was no Court adjudication. Instead, he himself, even without the knowledge of his co-executors or of others interested in the estate, adjudged his claim valid and disposed of the bonds as hereinbefore set forth.

The presiding Justice in instructing the jury as he did had before him facts devoid of any judicial determination of the respondent's rights following his qualification as executor.

However, in the instruction attacked in Exception 10, the Court did tell the jury that if the respondent "had a lien on them" (meaning the bonds) "if he had a right to them of some sort, when they were gathered, that lien should be settled by the law and by the facts as they are."

Furthermore, the Court gave this final instruction:

> "I am informed by the State that I instructed you that the executor could not have a claim against the estate. I did not intend to convey that impression. I said that if an executor, or meant to say that if an executor had a claim against the estate he could not be acting on his own initiative inconsistent with the rights of the estate and construing things in his own favor and against the estate. Of course, I did not mean he could not come into the courts and have it considered some place. And I think I did tell you that, but if I didn't tell you, of course, there is in the Probate Court, for instance, a method of filing claims against the estate; and I did not intend to convey and it would not be germane to this case at all about not being able to file one or having the right to file one in the Probate Court. As I say, I want to eliminate that."

Thus the Court did instruct the jury to the effect that whatever private rights he would claim against the estate he could not construe against it, nor determine "on his own initiative,"

but had the right to present the same to the Probate Court for its determination. Failing so to do, he could not lawfully rely upon his own belief as to such rights and act as though they had been established in the probate court. When he qualified as executor he estopped himself to deny the right of the estate to have immediate possession of the bonds. He was duty bound to deliver them to the legal representatives of the estate without awaiting any demand and to rid himself of any individual possession. Consequently, he had no right as an individual to do what he did following his qualification as executor and dispose of the bonds for his own personal use and benefit. Nevertheless, he would not be guilty under said Sec. 10, unless his conversion was fraudulent or unless he acted with a felonious intent.

The respondent takes nothing under Exceptions 7, 8, 9, 10, 11, and 16.

Exceptions 12, 14, *and* 15

These exceptions were to refusals to give requested instructions. The first of these instructions was this:

> "The State must prove beyond a reasonable doubt that the Respondent had a felonious intent to convert the property to his own use. And, if you find that the Respondent, in good faith, believed that he had the right to pledge these bonds for his own use, and did so in that belief, then the State has not proved his felonious intent, even though by law he did not have the right to do so."

We regard this as not an inaccurate statement of applicable law, provided the belief is "honest and well-founded." *State* v. *Morin,* 131 Me., 349, 352, 163 A., 102, 103. However, we think that the respondent takes nothing under this exception for the reason that in the charge it had been made sufficiently clear to the jury that such was the law. When the Judge refused the re-

quest he stated that he thought he had already given it in the charge. He then continued on with some remarks and finally said this:

> " . . . if he didn't intend to steal and honestly thought he had the right and that was an honest thought, later as a fact it appeared he had no right, and you should find he had no intent to steal or embezzle your verdict should be not guilty."

Therefore, he had dealt at length with this part of the respondent's defense, namely, that what he did was done without any felonious intent. One cannot read that portion of the charge without coming to the conclusion that the Judge made it perfectly plain to the jury that in order to secure a conviction the State must prove felonious intent beyond a reasonable doubt, even though the respondent did that which he had no legal right to do.

Exceptions 14 and 15 related respectively to the following refused instructions, namely:

1) "If Mrs. Foss, in her lifetime, authorized Parker B. Smith to use the proceeds of these bonds for his own property, and in his own business, with the understanding that he was to return the bonds, or the proceeds thereof six months after demand, then he cannot be guilty of embezzlement, either of the bonds or of the proceeds thereof, and he must be found not guilty of all the counts of this indictment," and
2) "If the Respondent was given the right by Mrs. Foss, in her lifetime, to use the bonds as collateral in his own business, and if you find that she gave or loaned him the bonds for that purpose, and if you also find that he, in good faith believed that he had the right to use the proceeds of those bonds for his own purposes, by virtue of his original understanding with

> her he cannot be guilty of embezzlement either of the bonds or the proceeds thereof, even though he legally would not have had the right so to do."

The first requested instruction was properly refused because it omitted the vital fact of his executorship and assumed that following the respondent's qualification as executor he could himself while executor determine and exercise his claimed private rights under the agreement.

The second requested instruction relates to the second ground of defense, namely, innocent action upon the part of the respondent. What we have said in connection with Exception 12 is here pertinent and need not be restated.

Exception 4

This exception was taken to a ruling of the Court permitting Mr. St. Gleason, a State witness and an employee of Coffin & Burr, to testify as to the reason why that firm stopped payment on the two checks it had sent to the respondent in payment of the purchase price of the Green Mountain bonds. His answer was:

> "We read this article in the Boston Post, in the morning paper of July 28th, and after reading it we felt that we couldn't be sure at all that this money was being paid to the right person. Therefore, we thought—on advice of counsel, after we consulted with counsel, that we had better stop payment and see what developed."

It was objected that this testimony was irrelevant, immaterial, and prejudicial. It will be recalled that the State claimed that the respondent, following his qualifications as executor, sent the Alabama bonds to Coffin & Burr for collection of the call money. This Coffin & Burr did, and held the proceeds on direction of the respondent. Later he ordered that Green Mountain bonds be purchased with those proceeds. This was

done. Then still later the respondent sold the Green Mountain bonds to Coffin & Burr, who sent him the checks in question, on which stop-orders were issued.

All this, the jury could have found, was done by the respondent as an individual and not as executor. It is true that the checks (made out to his individual order) were directly in payment of the Green Mountain and not the Alabama bonds, but the State was giving the history of the transactions with relation to the latter bonds with whose statutory larceny the respondent was charged. It was attempting to establish what he did from the time of his acquisition of the Alabama bonds until they, the subsequently purchased Green Mountain bonds, and the call money from both kinds of bonds passed out of his control, in order to determine whether any of his acts in regard thereto evidenced felonious intent or fraudulent conversion of the Alabama bonds.

Where subsequent acts, even though not in issue, tend to establish intent of the party in doing the acts in question, they are admissible. *Nickerson* v. *Gould*, 82 Me., 512, 515, 20 A., 86; *Perlin* v. *Rosen*, 131 Me., 481, 483, 164 A., 625.

No objection was made to evidence showing the purchase of the Green Mountain bonds for the respondent with the call money from the Alabama bonds, nor to the sale by him to Coffin & Burr of the Green Mountain bonds, nor to the fact of issuing and sending the checks to him, nor to the stop-orders of payment. Those facts were all before the jury. Then the question was asked why were payments stopped, and the Court permitted the reason therefor to be given. The answer cleared up a query that might well have puzzled the jury. Without the explanation, they might have inferred reasons much more harmful to the respondent than the reason given.

But if it be assumed that there were prejudice, it would seem to have been cured by testimony given by the respondent himself later in the case, for then he testified voluntarily as to the publicity that resulted from published accounts of the pro-

bate court proceedings in which he was directly charged with embezzlement. This publicity, he said, interrupted his negotiations to convert his plastic business into a contract, from which he expected to realize profits which would have enabled him to pay his bank loans and restore the bonds to the estate.

Furthermore, "A just verdict is not to be set aside because of a slight but comparatively harmless error in the omission or rejection of evidence." *State* v. *Priest,* 117 Me., 223, 231, 103 A., 359, 363. Mere technical error will not justify a new trial. The prejudice must be substantial. A just verdict will not be lightly set aside. *State of Maine* v. *Cloutier,* 134 Me., 269, 278, 186 A., 604.

For reasons stated, we do not feel that this exception should be sustained.

Exception 5

On cross-examination the State was permitted to interrogate the respondent in regard to certain Argentine Republic and Federal Land Bank bonds which he claimed he had misplaced. The defense objected to question as to whether or not he had concealed information as to the misplacement from his co-executors and from Messrs. Treat and Comins. The State in its elicitation of this testimony was attacking his claim of innocent action. The defense contends that the Court erred in admitting this evidence for the reason that it was irrelevant, immaterial, and prejudicial and had to do with bonds other than those that the State claimed the respondent had embezzled or fraudulently converted.

There were twenty-five $1,000 Federal Land Bank and twenty $1,000 Argentine Republic bonds. The respondent testified that eleven of the Federal had been misplaced and of the Argentine Republic, ten. They were not found afterwards. What actually became of them the record does not disclose. He admitted that he deposited the coupons of the bonds not misplaced and substituted cash for the coupons on those that

were misplaced, and then over objection of his counsel, he testified that he gave no information to his co-executors or to Treat or to Comins as to the missing bonds or as to the manner of deposit.

While he was not charged with embezzlement or fraudulent conversion of the Federal and Argentine bonds, they appeared in State's Exhibits 10 and 11, which were two of the five receipts which the respondent testified he had given to Mrs. Foss under the same agreement as to use and return of the same. All five receipts are practically identical in language, and evidence like transactions resulting from one general agreement.

> " . . . in cases where knowledge of intent of the party was a material fact, evidence of other facts happening before or after the transactions in issue, have been received in evidence, although they had no direct or apparent connection with it. Such facts, if they tend to establish knowledge *or intent,* when that is material, although apparently collateral and foreign to the main issue, nevertheless, have a direct bearing and are admissible. . . . 'Whenever the intent of a party forms a part of the matter in issue, upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question.' " *Nickerson* v. *Gould,* 82 Me., 512, supra, on page 515. (Italics ours.)

Also see *State* v. *Witham,* 72 Me., 531, 534, 535; *Nichols* v. *Baker,* 75 Me., 334, 336, 337; *State* v. *Acheson,* 91 Me., 240, 244, 39 A., 570; *Wood* v. *Finson,* 91 Me., 280, 284, 39 A., 1007; and *Peacock* v. *Ambrose,* 121 Me., 297, 299, 116 A., 832.

> " . . . evidence of similar acts may frequently be relevant, especially in actions based *on fraud and deceit,* because of the light which it throws on the state of mind of a person, as, for example, his knowledge, or motive or intent." Sec. 580, 32 C. J. S., 436. (Italics ours.)

The issues between the State and the respondent so far as this part of his defense was concerned related to *felonious* intent and *fraudulent* conversion.

Furthermore, "An issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances." Sec. 584, 32 C. J. S., 438, § 584.

In *Eaton* v. *Telegraph Company,* 68 Me., 63, Judge Peters said on page 67:

> "How far evidence of facts may be admissible to show the probability or non-probability of a main fact in issue, is one of the most troublesome questions in the law. Generally, collateral facts are not admissible. The evidence must be relevant. The difficulty is to decide what is and what is not relevant evidence. . . . But here, the dealing inquired about was between the same persons at the same time and relating to the same kind of property. The reason of the rule which excludes irrevelant testimony admits such as this."

The issue in the *Eaton,* supra, case was whether A was the owner of certain certificates of stock in his possession or was merely the custodian of them for B, the certificates having been issued to A and bearing upon their backs assignments by A to B, and it was held that it was competent for B to show that A at the same time held in his possession as custodian for B *other* certificates in the same company issued directly to B and belonging to B. This case was later cited with approval in *Rawson* v. *Knight,* 73 Me., 340, on page 343, in which it was held that "To strengthen the probability of the fact contended for by the plaintiff, he was permitted to show that the person, upon whom the service was made, had been, and at that time was, the defendant's agent and attorney in *other* business connected with the same estate." (Italics ours.)

In *State* v. *Witham,* 72 Me., 531, supra, it is stated on page 537:

> " 'Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less improbable.' Whar. Ev. Sections 20, 21. In *Trull* v. *True,* 33 Me., 367, it was held, that 'testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in issue.' " Also see *Wood* v. *Finson,* 91 Me., 280, 284, supra.

Claimed concealment of the misplacement of the Federal and Argentine bonds and manner of deposit of the coupons thereon accorded with the admitted withholding of information from his co-executors in relation to his transactions with the Alabama and Pennyslvania bonds. Both asserted concealments tended to show that he was not open and frank with his co-executors and were relevant on the issues of fraud and felonious intent.

Besides, this evidence was brought out on cross-examination. " 'In cross- examination . . . the rule' " (as to admissibility of evidence of collateral matter) " 'is not applied with the same strictness; on the other hand great latitude is allowed by the Judge, in the exercise of his discretion, when from the temper and conduct of the witness, such course seems essential to the discovery of truth.' " *State* v. *Kimball,* 50 Me., 409, 414. Also see *State* v. *Taylor,* 131 Me., 438, 439, 163 A., 777, and *State of Maine* v. *Hume,* 131 Me., 458, 461, 164 A., 198.

We detect no exceptionable error in the admission of this evidence.

Exception 17

This exception was taken to the refusal of the trial Judge to grant the respondent's motion in arrest of judgment. In the motion were set forth many grounds for the arrest, but only four

are now presented by respondent's counsel. The first two propound these questions:

> "*First*: Is it encumbent upon the State to allege ownership of the property?
>
> "*Second*: If such allegation is necessary, has the State properly set it forth?"

Without answering these questions as asked, it is necessary to state only that both Counts 1 and 3 contain sufficient averment to satisfy the requirements of pleading for a valid conviction under said Sec. 10. The statute does not itself specifically require that there shall be any allegation of ownership of the property. Conviction should follow proof beyond a reasonable doubt that one has embezzled or fraudulently converted to his own use property *delivered* to him which may be subject to larceny.

While it is true that in *State* v. *Walton*, 62 Me., 106, the one indicated was a public officer, namely, a tax collector, wherein it was held that it was not necessary to allege ownership in another, yet the Court said on page 109:

> "In order to ascertain whether an indictment can be maintained against an offender of either of these three classes, we must look to see whether it includes allegations of those facts which the legislature have declared essential to constitute the offence which it purports to charge. Beyond these we are not to seek. It is not for the court to require either allegation or proof of that which the legislature have omitted in their definition of the crime . . . ."

Under Sec. 10 it is "delivered to him" property of which he may be guilty of embezzlement or fraudulent conversion. We think the word "delivered" as used in this statute was intended to mean property entrusted to him in some fiduciary capacity. One does not ordinarily entrust his own property to himself in a fiduciary capacity. The word "delivered" would seem to

have been intended by the legislature sufficiently to denote property belonging to another without statement of whose property it was.

In this indictment the language of the statute was employed. Delivery of the property, stated to be that which had belonged to Mrs. Foss at the time of her decease and which had been disposed of in her will, was alleged to have been made to and received by the respondent as executor. Thus was negatived any possibility that it was the respondent's own individual property. Under the alleged facts he was apprised that the claim of the State was that he as one of the executors was the owner of the property.

In *State of Maine* v. *Strout*, 132 Me., 134, 167 A. 859, our Court stated on pages 135 and 136:

> "An indictment describing an offense in the language of the statute is sufficient. This commonly repeated rule is ordinarily correct. . . . It, however, depends upon the manner in which the offense is defined in the statute. If the statute does not sufficiently set out the facts which make the crime, so that person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet, then a more definite statement of the facts than is contained in the statute becomes necessary. . . . It is not enough that the indictment detail the facts from which an offense may be implied, or only so many of the essential elements as might suggest all the other elements; it must specify everything necessary to criminality."

Sec. 10 in our judgment does "sufficiently set out the facts which make the crime, so that a person of common understanding may have adequate notice of the nature of the charge which he is called upon to meet." That being so, employment of the language of the statute in the indictment was legally sufficient. Everything necessary to criminality under the statute

was specified in this indictment and demurrer thereto could not have been sustained.

The allegations in the counts in the indictment (based on said Sec. 10) in *State* v. *Snow*, 132 Me., 321, 170 A., 62, so far as ownership of the property is concerned, are practically identical with those in Counts 1 and 3 in this indictment. In that case it was averred that the property was in the decedent at the time of his death, that the respondent qualified as administrator of his estate, and that that property which had been the deceased's in his lifetime was delivered to the respondent as administrator and came into his possession and was received by him in that capacity in trust and confidence. The counts in the case at bar would seem to have been patterned on the *Snow*, indictment. In the *Snow* case the respondent demurred to the indictment. Exceptions were taken to the ruling below sustaining the indictment and these exceptions were overruled by this Court.

The third and fourth questions raised in this exception are these:

> "*Third*: Is it necessary for the State to allege the delivery to and receipt by the respondent of the property by virtue of his office as executor?
>
> "*Fourth*: Did the indictment contain such a proper allegation?"

We answer yes to both questions.

The attack herein made on the indictment is that delivery was not alleged properly inasmuch as "a very vital word is lacking from the indictment and that word is 'were.'" This omission occurred in both counts 1 and 3, that is, as to both the Alabama and the Pennsylvania bonds.

The bonds claimed to have been embezzled or fraudulently converted having been described in Count 1 in the indictment, these words follow:

" . . . each of said bonds being then and there of the value of one thousand dollars, and the said bonds being the property of the said Ella M. Foss aforementioned at her decease, to wit, on the eleventh day of December, in the year of our Lord nineteen hundred and forty-one, and which said bonds were part of the property of the said Ella M. Foss disposed of by and in the will of the said Ella M. Foss and codicils thereto aforementioned, and which said bonds were on said tenth day of March, in the year of our Lord nineteen hundred and forty-two at said Auburn, in said County and State, the subject of larceny, *and which said bonds, on said tenth day of March, in the year of our Lord nineteen hundred and forty-two, at said Auburn, in said County and State, delivered to the said Parker B. Smith and received by the said Parker B. Smith in trust and confidence as executor of the will of the said Ella M. Foss* . . . ."

Like language appears in Count 3. It will be observed that the sentences in both counts comprised several clauses and that the word "were" was used in each of the preceding, but probably by clerical, grammatical, or syntactic error was omitted in the particular clauses now in question.

Is such omission fatal? We do not think so. Certainly the respondent was not misled by that omission, nor was there any failure to apprise him sufficiently of the charges there made against him. We regard language in *State* v. *Littlefield*, 122 Me., 162 on page 163, 119 A., 113, as here appropriate:

"This court is of the opinion that the time has come when mere refinement of pleading should not be invoked as a subterfuge for the escape of manifest violators of the criminal law. When an indictment employs the use of language which makes clear and unambiguous the offense with which the respondent is charged, and enables him to fully comprehend the charges and make full de-

fense to every allegation in the indictment, we are of the opinion that such indictment is sufficient and should not be quashed, because it does not happen to be couched in that technical language and form required by the courts in pleadings, when the law required the infliction of the death penalty for stealing a sheep or imprisonment for life for committing what now may be called a misdemeanor."

Also see *State* v. *LaFlamme*, 116 Me., 41, where it is stated on page 43, 99 A., 772, 773:

"... if the meaning of an indictment is clear so that the accused is thereby informed of the precise charge which he is called upon to meet, verbal inaccuracies, grammatical, clerical or orthographical errors, which are explained and corrected by necessary intendment from other parts of the indictment, are not fatal."

Exception 6 *and the Appeal*

Finally we come to Exception 6 taken to denial of respondent's motion for a directed verdict and the appeal from the denial of the trial Judge to set the verdict aside. These present like questions and "accomplish precisely the same result." *State* v. *Bobb*, 138 Me., 242, 245, 246, 24 A., 2d, 229, 231.

Preceding their discussion of this exception and the appeal, respondent's counsel directed an attack upon the Court's charge as a whole, claiming that it was full of error, obscure, and confusing "so as to leave the jury in dark doubt as to what was the law to be applied by them in their deliberation."

The alleged errors in the charge have already been discussed as well as the denied instructions, and we have held that there were no erroneous rulings which would warrant us in sustaining any of the exceptions thereto. The attack of obscurity and confusion is not well founded. We believe that the jury ex-

perienced no difficulty because of the asserted obscurity and confusion. Apparently they considered that the law was made clear to them, for, although they were told by the Court that they would have a right to ask for further instructions, they did not.

Complaint is made of omissions to charge as to some elements of the crime and that the Judge did not read the statute to the jury on which the indictment was drawn.

In Sec. 104 of Chap. 96, R. S. 1930, it is provided that "During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case . . . . " Yet an attorney has a duty in connection with such trials and ordinarily he cannot take advantage of such an omission unless before the jury retires he calls the attention of the Court to it. He cannot sit by, remain silent, and secure an advantage when, as an officer of the Court, he should call the Court's attention to such omission.

> "If either party thinks any material matter has been misstated, or over-stated, *or omitted,* he should ask for proper corrections before the jury are finally sent out. He ought not to be silent then, when corrections can be made, and complain afterwards, when corrections can not be made." *Murchie* v. *Gates,* 78 Me., 300, 306, 4 A., 691, 701. (Italics ours.)
>
> Also see *State* v. *Fenlason,* 78 Me., 495, 501, 7 A., 385.

While the Court itself by such an omission would not comply fully with the statute (perhaps through inadvertence or diversion of mind), yet the litigant (no exception being taken) cannot in this Appellate Court, except as hereinafter stated complain if his attorney is at fault in not then making it possible for the jury to receive an omitted instruction.

Rule of Court XVIII pertinently provides in part:

> "Exceptions to any opinion, direction or *omission* of the

presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived." (Italics ours.)

In *Poland* v. *McDowell,* 114 Me., 511, our Court stated on page 512, 96 A., 834, 835:

"This rule was declared in *McKown* v. *Powers,* 86 Me., 291, to be merely an affirmance of a long pre-existing rule of practice. It is true that this rule is not always enforced. Exceptions not reserved before the jury retires are sometimes allowed as a matter of grace, but not as a matter of right. The excepting party is not entitled to them as of right. The presiding Justice is not required to allow them."

In the instant case no exceptions were taken to such claimed omissions. However, this Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions were not taken. *State* v. *Wright,* 128 Me., 404, 148, A., 141; *State of Maine* v. *Mosley,* 133 Me., 168, 175 A., 307; *Trenton* v. *Brewer,* 134 Me., 295, 186 A., 612; *Springer* v. *Barnes,* 137 Me., 17, 14 A., 2d, 503; *Megquier* v. *De Weaver,* 139 Me., 95, 27 A. (2d), 399; and *Cox* v. *Metropolitan Life Ins. Co.,* 139 Me., 167, 28 A. (2d), 143.

Such review, however, is not compatible with best practice, and although there be error in an instruction, when no exception is taken, a new trial either on appeal or motion should not be granted unless, as stated in the above cited cases, "error in law . . . was highly prejudicial . . . and well calculated to result in injustice," or "injustice would otherwise inevitably result," or "the instruction was so plainly wrong and the point involved so vital . . . that the verdict must have been based upon a misconception of the law," or "When it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled. . . . " We consider the foregoing applicable as well to an omission as to an errone-

ous instruction where no exception is taken. We hold that the case at bar does not come within the exceptions to the general rule.

In discussing the appeal it should be stated again that as to the facts proven there was very little dispute. The conflict arose almost wholly over what were proper inferences to be drawn from the facts proven as to *felonious* intent and *fraudulent* conversion. What was his state of mind? What motivated his act? When he converted the Alabama and Pennsylvania bonds into call money, did he then have "an honest and well-founded belief" that he had the right so to do? Did his claimed innocence of action have actual existence? The jury answered no to these factual questions. On the appeal the only question before us is whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that the respondent was guilty. *State* v. *Lambert*, 97 Me., 51, 52, 53 A., 879; *State* v. *Albanes*, 109 Me., 199, 201, 202, 83 A., 548; *State* v. *Priest*, 117 Me., 223, 227, 103 A., 359; *State* v. *Di Pietrantonio*, 119 Me., 18, 19, 109 A., 186; *State* v. *Gross*, 130 Me., 161, 163, 154 A., 187. A careful and painstaking study of the record convinces us that the jury was so warranted.

Exceptions overruled.
Appeal dismissed.
Judgment for the State.

REGINALD C. SPENCE

vs.

BATH IRON WORKS CORPORATION.

Sagadahoc. Opinion, April 13, 1944.

Workmen's Compensation Act. Occupational Disease. Employer and Employee. Evidence. Expert Opinion.

The Workmen's Compensation Act provides no compensation for disabilities resulting from occupational disease.

While an employer is not an insurer that the place where his employees are required to work is a safe one and is required only to use due care to furnish a reasonably safe place of work, it has been long established that he is required to warn his employees of hazards incidental to their work which are known to him and neither apparent nor known to his employees, and there is no sound basis for refusal to apply these principles of law, applicable to damage suffered at a particular time by reason of a defect in machinery, to the effects of an occupational disease contracted by handling materials of a deleterious nature over an interval of time.

Evidence of other events occurring at the same approximate time under conditions substantially identical with those in issue and under some circumstances comparable events relating to either a prior or a subsequent time is admissible to show that a particular damage is traceable to a particular cause, but this rule cannot be extended to permit evidence of such events to establish knowlege of the danger involved at a time subsequent to the happening in issue.

A qualified expert is not privileged to present opinion evidence as to the state of public knowledge concerning his specialty.

ON EXCEPTIONS AND MOTION FOR NEW TRIAL.

The plaintiff became infected with halowax acne as the direct result of handling degaussing cables in defendant's shipyard and suffered disability thereby. Plaintiff claimed that the nature of the poison contained in the cables and the presence

of that poison therein were known or should have been known to the defendant, though not known to him, and that knowledge by the defendant imposed upon the defendant the duty to warn the plaintiff of the danger involved and to take steps to protect the plaintiff therefrom, which duty the defendant failed to perform. The plaintiff testified, over objection, that other employees of the defendant, engaged in the same work, contracted the same type of poisoning, although at a time subsequent to that when he became infected. Defendant was engaged in the construction of destroyers for the United States Navy, was required to install the cables thereon and to obtain them from the Government, and had no choice in the selection. Plaintiff's medical expert testified, over objection, that employers engaged in the building of ships requiring the installation of degaussing cables should know of the poison and recognize the danger of infection. The jury awarded damages of $2,500.00 to the plaintiff. The defendant filed exceptions and a motion for a new trial. It was held that there was no occasion to consider the motion for a new trial since the verdict must be set aside because of errors in the admission of evidence. Exceptions sustained. The case fully appears in the opinion.

Edward W. Bridgham,

Harold J. Rubin, for the plaintiff.

William B. Mahoney,

John P. Carey, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

MURCHIE, J. The issues here presented for consideration arise under three exceptions to rulings made by the Justice who presided in the Trial Court, duly noted by the defendant and allowed on its behalf, and under a general motion for new trial

based on the usual grounds, including allegation that the damage award of $2,500 is excessive.

The first two exceptions relate to the admission, over objection, of evidence intended to prove that the defendant knew, or should have known, that the plaintiff was required to handle materials of a dangerous or deleterious nature in his work, and to establish negligence on its part in failing to warn the plaintiff of the hazard or to provide safeguards to protect him from the danger of infection necessarily incidental to that work. There can be no doubt on the record that the jury would have been justified in finding that the plaintiff became infected with a skin disease, which the dermatologists call hal-acne or halowax acne, as the direct result of handling and working upon degaussing cables in defendant's shipyard.

The defendant is an assenting employer under the Workmen's Compensation Act, R. S. (1930), Chap. 55, but the damage for which recovery is sought results from an occupational disease rather than from accidental means, and compensation therefor under the terms of that Act is not available, *Dillingham's Case*, 127 Me., 245, 142 A., 865.

No case in this jurisdiction heretofore has raised the issue whether an employee may recover from his employer in a common law action for damage suffered from an occupational disease contracted in the course of his employment but the great weight of authority permits such recovery on proof that the employer knew, or should have known, that the hazard of disease existed in the employee's work in a manner neither apparent nor known to him, and that the employer neither gave him warning of the fact nor furnished recognized safeguards against the risk. See the annotation in 105 A. L. R. commencing at page 80, and particularly *Thompson* v. *United Laboratories Co.*, 221 Mass., 276, 108 N. E., 1042. The basis of recovery, in Massachusetts as generally in those jurisdictions where it is permitted, rests upon the application of principles thoroughly recognized and established in this Court.

Ample authority supports the principles that an employer, although not an insurer of his employees' safety, must use due care to furnish a reasonably safe place of work, *Elliott v. Sawyer,* 107 Me., 195, 77 A., 782; *Sheaf* v. *Huff,* 119 Me., 469, 111 A., 755; *Morey* v. *Maine Central Railroad Co.,* 127 Me., 190, 142 A., 585; and that when a hazard known to the employer and not to the employee is involved the duty rests on the former to warn the latter of the fact. *Welch* v. *Bath Iron Works,* 98 Me., 361, 57 A., 88; *Dirken* v. *Great Northern Paper Co.,* 110 Me., 374, 86 A., 320, Ann. Cas. 1914 D 396; *Kimball* v. *Clark,* 133 Me., 263, 177 A., 183. There seems to be no sound basis for distinction either between damage suffered by a particular happening or event and that which flows from impairment of health over an interval of time, or between a defect in machinery, appliances or a place of work and a dangerous quality in materials or instrumentalities required to be handled, and we would not hesitate to permit recovery for an occupational disease on proper proof that an employer had negligently failed to warn of a risk of disease known to him which was neither apparent nor known to his employee. We do not reach this issue in the instant case presently because the verdict must be set aside on the exceptions. It is clear that evidence improperly admitted may have been the basis for the factual finding of negligence on the part of the employer.

The evidence discloses that the plaintiff entered the employ of the defendant in April 1942, that he worked a short time wiring guns and was then transferred to a crew engaged in installing degaussing equipment. The dates are not all definitely set forth, but proof is ample that infection developed after the plaintiff had been engaged in such work less than two months, and that he appeared at the defendant's First Aid Room on June 27th, 1942. Two fellow employees engaged in the same kind of work suffered like infections at later times, and after longer periods. One declared that he contracted the rash 5 or 6 months after he commenced to handle degaussing

cables, but gave no date except that he entered the employ of the defendant in March 1942. Another said that it was "two months anyway" after he began to work on the cables before he was bothered with the infection, and that he first noticed it in March 1943.

During all the time pertinent to the present inquiry the defendant was engaged in the construction of naval craft for the United States Government, on which it was required to install the equipment in question, the exact nature and operation of which are not material. Armored cables and terminal boxes were involved, and plaintiff's work required him to strip the armor and insulation from a considerable length of cable and connect the several conductors enclosed within it to the terminals for which they were intended. In the stripping process a material known as halowax flaked off in considerable quantity, and for the purposes of this case it must be assumed that the contact of this material with plaintiff's skin and the failure to remove it by washing with sufficient frequency and a proper solvent led to the damage which plaintiff undoubtedly suffered.

The evidence makes it entirely clear that the defendant had no voice in the selection of the cables used but obtained them from the Navy Department of the Government on requisition. In the testimony offered on behalf of the plaintiff it appears that such cables were made by at least three companies, and that those produced by one of three that were named caused more trouble than those made by either of the others "where the wax does not flake out as easily."

Since the defendant had no part in the selection of the cables on which it caused the plaintiff to labor, there can be no basis for a claim of negligence on its part in the procurement thereof, nor does the declaration allege such negligence. The claims, as already noted, are that the nature of the poison was peculiarly within the knowledge of defendant (as also, by inference, its presence), and that there was failure in the duties

to warn of its presence and provide protection against its operation. The record presents no suggestion of proof that the defendant or any of its agents had such knowledge, either peculiar or actual, but the items of testimony to which both the first and second exceptions relate were offered in plaintiff's own testimony, as the bill of exceptions declares, to establish factually that the defendant did know, "or should have known." The first exception relates to the admission of testimony that fellow employees of the plaintiff, engaged in the same kind of work, suffered the same kind of infection. The second refers to opinion evidence which, according to a recital in the bill of exceptions, was designed to show that defendant should have had the knowledge in question at a time prior to that when "the plaintiff was directed to work on the cables."

Evidence of other events occurring at the same approximate time and under conditions substantially identical with those prevailing when the damages involved in litigation were suffered, and under some circumstances comparable events relating to times either prior or subsequent thereto, is admissible to prove that damage is traceable to a particular cause. *Crocker* v. *McGregor*, 76 Me., 282; *Thatcher* v. *Maine Central Railroad Co.*, 85 Me., 502, 27 A., 519; *Lynn* v. *Hooper*, 93 Me., 46, 44 A., 127; *Mitchell* v. *Bangor & Aroostook Railroad Co.*, 123 Me., 176, 122 A., 415. This principle was recognized in Massachusetts in *Shea* v. *Glendale Elastic Fabrics* Co., 162 Mass., 463, 38 N. E., 1123.

It seems almost self-evident that this principle could not be applicable to make evidence of events after an occurrence available to prove knowledge before it, and the employees whom the plaintiff declared became infected as he did, when testifying in his behalf, made it apparent that their own experiences were subsequent to his. Such experiences could not have given the defendant the knowledge requisite to serve the present cause at a time when action thereon would have safe-

guarded the plaintiff. The evidence to which the first exception relates was not admissible to prove such knowledge as would impose a duty to warn and although it would have been proper testimony to show that plaintiff's damage was traceable to halowax and the stated objection was general in terms, it should have been excluded in view of the very definite basis on which it was tendered.

The evidence to which the second exception relates was clearly inadmissible for any purpose. Plaintiff presented a dermatologist as an expert witness and qualified him to testify as to the disease from which plaintiff suffered, its history, the manner in which it might be contracted, and its treatment. This witness testified also as to the state of public and professional information upon the subject matter, and after declaration that the first published work on it which he saw personally appeared in the American Medical Association Journal in January 1943, he was asked if it should have been well recognized by any company dealing with or handling a cable of the type on which plaintiff worked. The question carried nothing more than inference that it related to a time prior to plaintiff's infection, but that inference is reasonably manifest from the preceding inquiry, answered affirmatively, as to whether the disease had been well known to the medical profession since 1918. The question as to whether any company handling degaussing cables should have recognized the danger that workmen might become infected from it was answered affirmatively after objection, and exception was noted and allowed.

This exception must be sustained. That opinion evidence is not ordinarily admissible requires no citation of authority. That the opinion of qualified experts within their chosen field does not come within this general rule of exclusion is likewise thoroughly established, but the exception here in question relates to evidence of an expert in a professional field testifying about his assumption or opinion relative to the state of public

knowledge concerning his specialty, rather than to the specialty itself. See *Caven* v. *Bodwell Granite Co.*, 97 Me., 381, 54 A., 851. The plaintiff cites us to *Illinois Steel Co.* v. *Fuller*, 23 N. E. 2d., 259, as supporting his claim that this evidence was properly admitted, but the evidence held admissible in that case was the opinion of the employee's attending physician, whose qualification as an expert was questioned, as to whether the disability for which recovery was sought was traceable to benzol poisoning. The decision contains no suggestion that opinion evidence such as that now under consideration would have been considered proper.

The third exception was to the denial of a motion for a directed verdict, but there is no occasion for consideration thereof, or of the motion for new trial which raises the same question, since the verdict must be set aside for errors in the admission of evidence.

Exceptions sustained.

FRANCIS DUPLISEA, PETITIONER
FOR WRIT OF HABEAS CORPUS

vs.

JOHN H. WELSH, WARDEN.

Knox. Opinion, April 13, 1944.

Habeas Corpus. Assault with Dangerous Weapon with Intent to Steal.

Assault with intent to steal by one armed with a dangerous weapon was constituted a felonious assault by Statutes in 1821, Chapter 7, Section 11, and is punishable under R. S. 1930, Chapter 129, Section 24, by imprisonment for not more than 20 years, as it has been since the statutory revision of 1840 which became effective in 1841.

ON EXCEPTIONS.

Petition in habeas corpus proceedings. The petitioner is confined in the State Prison, having been convicted of the crime of assault with a dangerous weapon with intent to steal and of larceny. His sentence was for imprisonment for not less than eight years nor more than sixteen years. The petitioner alleged that he was unlawfully imprisoned, having served for more than five years at the time of filing his petition, because the offense with which he was charged was not recognized as anything more than assault at common law and had not been constituted as more than that by any legislation in this State. Petition denied. Petitioner filed exceptions. Exceptions overruled. The case fully appears in the opinion.

C. S. Roberts, for the petitioner.

Frank I. Cowan, Attorney General,

Nunzi F. Napolitano, Assistant Attorney General, for the State.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, J.

Chapman, J., dissenting in part.

MURCHIE, J. The petitioner herein is confined in the State Prison under a warrant of commitment showing the imposition of a sentence of not less than 8 years, nor more than 16, following his conviction of the crimes of assault with a dangerous weapon with intent to steal, and larceny. The issue raised relates exclusively to the propriety of that penalty as punishment for the assault. The petitioner asserts that he is now unlawfully imprisoned because the offense charged was not recognized as anything more than an assault at common law and has never been constituted as more in this State by legislation duly enacted, wherefore the maximum penalty to which he might have been subjected when sentence was imposed was 5 years. R. S.(1930), Chap. 129, Sec. 27. It is admitted that with proper time allowances for good behavior a 5 year term, figured from the date of his commitment, would have been fully served prior to the filing of the petition.

The case comes to this Court on exceptions to a ruling below that the sentence was a valid one under R. S. (1930), Chap. 129, Sec. 24. Exceptions lie to secure review in habeas corpus proceedings, *Holbrook, Petitioner,* 133 Me., 276, 177 A., 418, but there can be no doubt of the propriety of the action sought to be reviewed unless, as contended, that statute is inoperative as relating to assault with intent to steal. The language therein, defining the offenses for which its penalty is imposed, has remained unchanged since the statutory revision of 1857, wherein Chap. 118, Sec. 25 uses identical wording. The recitals in that early revision consolidated the provision of R. S. (1841), Chap. 154, Secs. 29 and 30, which dealt separately with assaults when armed with a dangerous weapon in the one case, and when not so armed in the other. Changes in the phrase-

ology by which the offenses had been earlier described are unimportant since they carry identic meaning.

R. S. (1930), Chap. 129, Sec. 24 declares, as did R. S. (1841), Chap. 154, Sec. 29, that assault by one armed with a dangerous weapon with intent to murder, kill, maim, rob or steal, or to commit arson or burglary, is punishable by imprisonment for a maximum term of 20 years. In the 1841 statutes the following section related to such assaults when not so armed, and the annotations to the two sections purport to show that Section 29 presented a consolidation of the 1821 Statutes, Chap. 2, Secs. 5 and 6, and Chap. 7, Sec. 9, while the next did the same with Chap. 2, Sec. 6 and Chap. 7, Sec. 11 of said Statutes and P. L. 1836, Chap. 241, Sec. 1.

If nothing more than the laws referred to in the annotations were to be regarded, there would be ground for the claim that our present Sec. 24 of Chap. 129 has no foundation in legislation. The section in the 1841 revision to which it traces back imposed imprisonment for not more than 20 years as punishment for assault with a dangerous weapon with intent to commit any of the crimes stated. The 3 sections of the 1821 Statutes to which its annotation refers related only to such assaults when the intent was to murder, to maim, or to rob, and the punishments thereby imposed, disregarding solitary confinement which was eliminated in all three cases by P. L. 1827, Chap. 368, Sec. 3, carried the 20 year maximum only where the intent was to murder or to rob. When the intent was to maim the maximum was 4 years.

That part of the pertinent statute which traces back to R. S. (1841), Chap. 154, Sec. 30, is not presently involved, but it may be noted that while it deals exclusively with assaults not involving a dangerous weapon, two of the annotated sections deal only with such assaults. The 1836 law referred to imposed a penalty for assault with intent to murder without reference to arms.

The provisions of R. S. (1930), Chap. 129, Sec. 24, like those of R. S. (1841), Chap. 154, Sec. 29, cover a wider range of criminal intent than the three sections of earlier law to which the annotator referred, but so far as intent to kill is concerned, Chapter 6 of the 1821 Statutes, which dealt with burglary, shows by comparison of Sections 1 and 4 how the gravity of a crime was considered to be aggravated if committed by one armed with a dangerous weapon. Both sections treat intent to kill, to rob or to steal identically, and Chapter 7 not only links the offenses of robbing and stealing in more than one instance, but in Sections 9 and 11 presents duly enacted legislation dealing with assaults by one armed with a dangerous weapon with intent to rob in the former and steal in the latter. Section 11 is shown in the annotations to the 1841 Statutes as furnishing a part of the historical background for Chap. 154, Sec. 30, where a maximum penalty of 10 years, without reference to solitary confinement disposed of in 1827, was imposed for assault unarmed, with intent to steal.

No case heretofore has presented the issue to this Court whether the word "steal" was properly written into the particular section of the 1841 revision. The same is true as to the word "kill," although cases involving assault with intent to murder or to kill carry clear recognition that the two offenses are separate and distinct from each other, the former being of a higher grade and including the latter. To refer to only one such case, *State* v. *Waters,* 39 Me., 54, declaration was made that an assault with intent to kill, as distinguished from one with intent to murder, was not recognized as a crime at common law, but had been made so in this State by statute. This may likewise be said of assault with intent to steal when made by one armed with a dangerous weapon, Statutes 1821, Chap. 7, Sec. 11. That it was consolidated with others in the process of statutory revision, that in the process the penalty was increased, or that simultaneously a new offense of assault when not armed was written into the statute without foundation in

express legislative enactment, presents no warrant for declaration that one convicted of it should not be punished within the limits of the maximum penalty imposed. The offense punishable under R. S. (1930), Chap. 129, Sec. 24, is assault with any one of several specified intents, aggravated when committed by one armed with a dangerous weapon. Of such an offense the petitioner was charged, tried and convicted. Denial of his petition in the Superior Court was proper.

Exceptions overruled.

CHAPMAN, J., dissenting in part.

I concur in the conclusion reached in the above opinion, but do not believe that the discussion of the statutes enacted previous to the statute under which the indictment was drawn, to be necessary or helpful. Rather, I believe that to base the interpretation of the statute under which the indictment was drawn, in whole or in part upon the previous enactments, is to establish a precedent in violation of the universally accepted rule that, when the language of a statute and the purpose sought are clear, the court will not go beyond the terms thereof for its interpretation.

The indictment charged the defendant with assault with intent to steal while armed with a dangerous weapon. The statute reads as follows:

> "Whoever assaults another with intent to murder, kill, maim, rob, steal, or to commit arson or burglary, if armed with a dangerous weapon, shall be punished by imprisonment for not less than one year, nor more than twenty years;"

I see no reason why the Legislature that put into our Revised Statutes, Section 24 of Chapter 129, could not make it a

crime to commit an assault with intent to steal while armed with a dangerous weapon and impose the penalty provided, irrespective of what any previous Legislature had seen fit to do. It attempted to do this in words that are as well understood by the common laborer as the college professor and which have no legal meaning different from their common usage.

Endlich on Interpretation of Statutes, Section 51, says:

> "As to codifications and revisions, which, upon a principle that will hereafter become manifest, are held, in general, to repeal enactments covered by their provisions, it is, no doubt, true, that, like the Revised Statutes of the United States, they must be accepted as the law upon the subject they embrace, as it existed when the Revision or Code went into force, and that, consequently, when their meaning is plain the Court cannot recur to the original statute to see if errors were committed in revising them."

To the same effect is *United States* v. *Bowen*, 100 U. S., 508, 25 L.Ed., 631; *Arthur* v. *Dodge*, 101 U. S., 34, 25 L.Ed., 948; *Vietor* v. *Arthur*, 104 U. S., 498, 26 L.Ed., 633.

In the latter case the court said:

> "In *United States* v. *Bowen* (100 U. S., 508), we held that the Revised Statutes must be treated as a legislative declaration of what the statute law of the United States was on the 1st of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision. That could only be done when it was necessary to construe doubtful language."

59 Corpus Juris 1098 says upon this subject:

> "So where the meaning of the language of a revision or code is plain and unambiguous, it must be construed without resort to the original statutes which have been brought into it;"

Of particular application is *Bent* v. *Hubbardston,* 138 Mass., 99. This case holds squarely that:

> "When there is substantial doubt as to the meaning of the language used in the Public Statutes, the statutes as they previously existed afford, therefore, a most valuable guide in their construction. But when language is clear, we cannot look to the earlier statutes to see if an error has been made by the Legislature in its understanding of them, as there is then no room for the office of construction." . . . .
> "Even if the meaning it has affixed to the earlier statutes is different from that we should attribute to them, that which it has adopted, if clearly expressed by the Public Statutes, is controlling. If the language of the statute, as it now exists, were susceptible of two constructions, an argument drawn from the statute as it was formerly expressed (should we adopt the meaning given to it by the plaintiff) would be conclusive. *United States* v. *Bowen,* 100 U. S., 508." . . . .
> "In this view, we do not deem it necessary to consider what is the proper construction of the statutes as they existed before the enactment of the Public Statutes."

Our own court said in *Estabrook* v. *Steward Read Co. et al.,* 129 Me., 178, 151 A., 141, 144:

> "In interpreting and construing the statutes the first consideration is to ascertain and give effect to the intention of the Legislature, but when the language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning."

It is true that the statutes discussed in the opinion do not disclose anything that is at variance with the interpretation to be given it according to the plain meaning of the terms; but

the opinion, by seeking "foundation in legislation" in interpreting the statute and inquiring if the world "steal" was properly written into the statute, definitely becomes a precedent for the principle that although a statute is plain and unambiguous in its terms it will be interpreted in the light of previous enactments, which principle is contrary to general authority.

HOMER E. ROBINSON,
BANK COMMISSIONER OF THE STATE OF MAINE
vs.
FIDELITY TRUST COMPANY,
IN RE PETITION OF THE STATE OF MAINE.

Cumberland. Opinion, April 21, 1944.

Taxation. Emergency Banking Act.

The tax upon a trust and banking company provided by Revised Statutes, chapter 12, sections 72-75 as modified by P. L. 1931, c. 216, is an excise laid upon the value of the franchise of the bank when the tax is assessed, that is, a franchise tax upon its capacity to transact its business and enjoy the privileges granted by its charter.

One-half of the tax is assessable as of the fifteenth day of May and one-half as of the fifteenth day of November of each year and then only becomes a debt of the bank.

If returns are made by a domestic incorporated trust and banking company as required the semi-annual assessments of its tax under the statute are upon the value of its franchise as of the fifteenth days of May and November of the current year, measured by the average of its deposits less allowable deductions for the six months ending on and including the preceding last Saturdays of March and September.

If returns are not made by such a bank the tax provided by the statute is assessable, one-half as of the fifteenth day of May and one-half as of the fifteenth day of November upon the value of its franchise on those days as fixed by the Bureau of Taxation.

Under R. S., c. 12, §§ 72-75, as modified, the tax upon a domestic incorporated trust and banking company is not assessable as of the dates when returns are or should be made by the bank.

The liquidation of the Fidelity Trust Company through a conservator in the instant case was authorized by the Emergency Banking Act, P. L. 1933, c. 93, and the conservator was governed by the general rules applicable to receivers of trust and banking companies.

While the appointment of the conservator did not work a dissolution of the Fidelity Trust Company, when pursuant to decretal orders he took possession of its properties and facilities, ousted its officers from its quarters and the control and management of its business and began final liquidation, the bank was deprived of its right and power to exercise the privilege of doing business under its franchise.

A trust and banking company is not subject to the tax provided by R. S., c. 12, §§ 72-75 where it has no right nor power to exercise its franchise and the franchise is not in fact being exercised by anyone in its behalf and interest when the tax is assessed even though there is a legal possibility that its corporate functions may be resumed.

When the franchise tax here claimed was assessed, the Fidelity Trust Company had been deprived of its right and privilege to exercise its franchise and, as there was then no foundation upon which the tax could rest, it is invalid and cannot be allowed.

ON REPORT.

Proceeding in equity brought by the Bank Commissioner under Public Laws, 1933, Chapter 93. By decree of the Supreme Judicial Court of March 18, 1933, a conservator, pending hearing, was appointed for the Fidelity Trust Company, which appointment, on April 13, 1933, was confirmed and made permanent. The conservator forthwith began liquidation of the Company, the liquidation being still continuing at the time of this proceeding to collect a tax assessed against the Fidelity Trust Company by the State Bureau of Taxation on May 13, 1933. The record shows that since March 18, 1933, neither the Company not its conservator have ever carried on

a banking business except in winding up its fiduciary and representative affairs. The liquidation was in progress at the time when the tax claimed was assessed. Held that the tax assessed was invalid. Case remanded for decree in accordance with such holding. The case fully appears in the opinion.

Frank I. Cowan, Attorney General,

John O. Rogers, Assistant Attorney General, for the petitioner.

Cook, Hutchinson, Pierce & Connell, for Robert Braun, Conservator of Fidelity Trust Company.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

STURGIS, C.J. In this proceeding in equity brought by the Bank Commissioner under Public Laws 1933, Chapter 93, known as the Emergency Banking Act, by decree of the Supreme Judicial Court of March 18, 1933, a conservator pending hearing was appointed for the Fidelity Trust Company of Portland, a state trust and banking company, who, as ordered, forthwith began its liquidation, and, the appointment having on April 13, 1933 been confirmed and made permanent, the liquidation has continued without interruption and is still in progress. The State of Maine, by petition, here presents a claim for a tax assessed against the Fidelity Trust Company on May 15, 1933 and prays that it may be allowed and ordered paid by the conservator out of assets remaining in his hands. The claim being resisted, by agreement the case is reported for decision, on the legally admissible evidence, as law and equity require.

The tax in controversy was assessed against the Fidelity Trust Company by the State Bureau of Taxation on May 15, 1933 and as the semi-annual assessment for the first six months of that year one-half of the annual tax upon the bank provided

by R. S., c. 12, §§ 72-75 as modified by P. L. 1931, c. 216. In Section 72, as modified, every domestic incorporated trust and banking company is required semi-annually on or before the first Saturdays of April and October to make returns, signed and sworn to by its treasurer, to the Bank Commissioner of the average amounts of its time and interest bearing deposits for the six months preceding the last Saturdays of March and September together with statements of its deductible assets and investments with their par value, cost and book value, and it is the duty of the Bank Commissioner within thirty days thereafter to determine the cost and value of the assets and investments and transmit the same with the returns to the Bureau of Taxation. In Section 73, as modified, it is provided that the Bureau of Taxation shall thereupon deduct from the average amount of the deposits returned an amount equal to the cost and value, so determined, of the deductible assets and investments and upon the balance found assess an annual tax of one-half of one per cent; "one-half of said tax shall be assessed on or before the fifteenth day of May on the balance of said deposits so ascertained for the six months ending on and including the last Saturday of March, and one-half on or before the fifteenth day of November on the balance of said deposits so ascertained for the six months ending on and including the last Saturday of September." It is then made the duty of the Bureau of Taxation to certify the assessments to the State Treasurer and he to forthwith notify interested trust and banking companies and the taxes so assessed become payable within ten days after the fifteenth days of May and November. In Section 74 the deposits upon which the taxes are based are exempted from municipal taxation. In Section 75, as modified, if a trust and banking company fails to make the required returns, the Bureau of Taxation is directed to assess the tax upon it on such valuation as is thought just and the assessment is final.

The tax is not a property tax but is an excise imposed upon

the right of the bank to exercise the privileges of its franchise. The excise is not laid upon the property of the bank, or its deposits, or on the business which the bank transacted during the given periods, but upon the value of its franchise when the tax is assessed, that is, its capacity to then transact its business and enjoy the privileges granted by its charter, measured, if the returns are made, by the standard of its average deposits less allowable deductions for the six months preceding the designated dates, and measured, if the returns are not made, by the valuation placed upon it by the Bureau of Taxation. *Jones* v. *Winthrop Savings Bank,* 66 Me., 242; *Provident Institution* v. *Massachusetts,* 6 Wall, 611, 18 L. Ed., 907; *Society for Savings* v. *Coite,* 6 Wall, 594, 18 L. Ed., 897; *Shippee* v. *Commercial Trust Co.,* 115 Conn., 313, 161 A., 781; *Greenfield Savings Bank* v. *Commonwealth,* 211 Mass., 207, 97 N. E., 927; *Com.* v. *Lancaster Savings Bank,* 123 Mass., 493; *Com.* v. *The People's Five Cents Savings Bank,* 5 Allen (Mass.) 428; *State* v. *Central Savings Bank,* 67 Md., 290, 10 A., 290, 11 A., 357; *State* v. *Bradford Savings Bank and Trust Company,* 71 Vt., 234, 44 A., 349, 102 A. L. R., 62,n. The imposition of a franchise tax of this kind is lawful in this State. *Opinion of Justices,* 102 Me., 527, 66 A., 726.

As a reading of the statute discloses the semi-annual taxes on trust and banking companies, by express mandate, *shall be assessed on or before* the fifteenth days of May and November. A tax cannot be said to be assessed until the amount is made certain. If returns are made by the bank certainty does not lie in the returns as and when made but in the amounts of the balances of its average deposits for the designated periods as and when they are found by the Bureau of Taxation after deducting the cost and value of enumerated assets and investments as determined by the Bank Commissioner. If no returns are made the amount of the tax is determined by the valuation fixed by the Bureau of Taxation and cannot rest on the returns. This statute differs materially from those which impose similar

franchise taxes based solely on the returns of the bank and fail to expressly provide when the assessment shall be made. Under such statutes by construction the days when the returns are or should be made are deemed to be the dates of the assessments of the taxes and of their existence as subsisting debts. (Me.) P. L. 1875, c. 47, § 1, *Jones* v. *Winthrop Savings Bank,* supra; (Mass.) *Sts.* 1862, c. 224, § 4 et seq, *Com.* v. *The People's Five Cents Savings Bank,* supra; (Conn.) *General Statutes,* §§ 1285-1287, *Shippee v. Commercial Trust Co.,* supra. As to the time of the assessment, the statute is analogous to that which requires corporations generally to pay annual franchise taxes and fixes the date *on or before* which the taxes shall be assessed. R. S., c. 12, § 21 et seq. It has been decided that such taxes are assessable only *as of* the designated date and then only become debts of the corporation. *Johnson* v. *Johnson Bros.,* 108 Me., 272, 80 A., 741, Ann. Cas., 1913 A., 1303. We think that a similar rule of construction should prevail here and it must be held that under R. S., c. 12, § 72 et seq the semi-annual taxes on trust and banking companies are assessable *as of* the fifteenth days of May and November, and then only become debts of the banks.

If a bank is, voluntarily or otherwise, restricted but allowed to remain in the hands and under the management of its officers and otherwise exercise and enjoy its chartered rights and privileges it is liable for a tax assessed upon its franchise during that period. *Maine* v. *Waterville Savings Bank,* 68 Me., 515; *Com.* v. *Barnstable Savings Bank,* 126 Mass., 526; *Shippee* v. *Riverside Trust Company,* 113 Conn., 661, 156 A., 43; *People* v. *Holland Trust Company,* 123 N. Y. S., 935. However, by the clear weight of authority, if a corporation is placed in the hands of a receiver, ousted from its properties and facilities and deprived of its right or privilege to exercise its franchise, that is, to conduct its own business, neither the corporation nor the receiver is liable for a franchise tax assessed thereafter. The rule has prevailed where a bank was so taken over by the bank com-

missioner without court proceedings. And it has been applied regardless of whether injunction issues or dissolution has taken place, and even though the receiver is temporary and there is a possibility that the corporation may be re-organized and resume its functions. *Jones* v. *Winthrop Savings Bank,* supra; *Johnson* v. *Johnson Bros.,* supra; *Shippee* v. *Commercial Trust Company,* supra; *Bassett* v. *Merchants Trust Company,* 115 Conn., 364, 161 A., 785; *Com.* v. *Lancaster Savings Bank,* supra; *Greenfield Savings Bank* v. *Commonwealth,* supra; *State* v. *Bradford Savings Bank and Trust Company,* supra; *Michigan Trust Co.* v. *Michigan,* 52 F. (2d) 842.

The reported case shows that, while never enjoined, since the decree of March 18, 1933 appointing the conservator, except it has been engaged in winding up its existing fiduciary and representative affairs, neither the Fidelity Trust Company nor the conservator has ever attempted to carry on a banking business. Immediately after qualifying, the conservator, in accordance with decretal orders, took possession of the real and personal property, books, accounts, vouchers and papers of every nature belonging to the bank, ousted its officers from its quarters and the control and management of its business and began liquidation. On April 4, 1933 an assessment of 100%, aggregating one million dollars ($1,000,000), was made upon the stockholders of the bank. On the same day a Special Master was appointed to receive, ascertain and fix all priority claims. By decree of April 13, 1933 the appointment of the conservator was confirmed and made permanent. On May 4, 1933 the Special Master was authorized to receive, pass upon and report all claims against the bank and the time was fixed in which they might be presented or forever be barred. And on May 5, 1933 for the purpose of paying a distributive dividend the conservator was authorized to apply to the Reconstruction Finance Corporation for a loan secured by a pledge of the segregated assets of the bank. This record confirms the stated fact in the report that final liquidation was contemplated and

undertaken as soon as the conservator was appointed and was in progress when the instant tax was assessed. It need only be added that substantially all of the assets of the Fidelity Trust Company have been converted into money and paid out as dividends and it is reasonable to assume that final distribution will not be long delayed.

It is true that under the Emergency Banking Act if it had been found to be for the benefit of the depositors and the public the Fidelity Trust Company could have been re-organized and it may be that this proceeding was begun with the hope or even belief that might take place. The record shows, however, that the Fidelity Trust Company was hopelessly insolvent, no attempt was made to re-organize it, a new bank was formed and it was at once decided that final liquidation was the only alter native. Although Section 11 of the Emergency Banking Act permitted the appointment of a receiver or trustee to liquidate the Fidelity Trust Company in accordance with the provisions of R. S., c. 57 § 52 et seq, it being provided in Section 4 that a conservator might be appointed who should have all the rights, powers and privileges given receivers of banks and trust companies, the Supreme Judicial Court having jurisdiction elected to liquidate the bank through a conservator and it has been recognized that this procedure was authorized, and the conservatorship is governed by the general rules applicable to receivers of trust and banking companies. *Cooper* v. *Fidelity Trust Company*, 132 Me., 260, 170 A., 726.

While the appointment of the conservator did not work a dissolution of the Fidelity Trust Company it suspended its functions and authority over its property and effects. *Cooper* v. *Casco Mercantile Trust Company*, 134 Me., 372, 186 A., 885, 111 A. L. R., 548; *Greenfield Savings Bank* v. *Commonwealth*, supra; *High on Receivers*, Sec. 290; 45 Am. Jur., 116 and cases cited. It deprived the bank of its right and power to exercise the privilege of doing business under its franchise as completely as if injunction had issued or the bank been placed in dissolu-

tion. *Michigan Trust Co.* v. *Michigan,* supra. It had this effect when under his temporary appointment the conservator ousted the bank and took possession. *Bassett* v. *Mercantile Trust Company,* supra. From then on neither the bank nor the conservator can be deemed to have exercised the corporate franchise. *Shippee* v. *Commercial Trust Company,* supra. As was aptly said in *Greenfield Savings Bank* v. *Commonwealth,* supra, "Such a corporation is not subject to an excise tax when it has no right nor power to exercise its franchise and when its franchise is not in fact exercised by anyone in its behalf and interest, even though there is a legal possibility that its corporate functions may be resumed."

It is to be borne in mind that the affairs of the Fidelity Trust Company are in the hands of the conservator as an officer of the court and this controversy is not between this claimant and the bank but between the claimant and the depositors of the bank. There are no superior equities. The law of the case compels the conclusion that the Fidelity Trust Company had been deprived of its right and privilege to exercise its franchise when the excise tax here claimed was assessed and as there was then no foundation upon which the tax could rest it is invalid and cannot be allowed. In view of that decision it is not necessary to discuss, much less to decide, other matters of defense raised and argued on the briefs. The cause is remanded for entry and decree in accordance with this decision.

So ordered.

EDWIN E. JONES *vs.* PERLEY E. BERRY.

Cumberland. Opinion, May 31, 1944.

Account Annexed. Statutes.

The declaration of the plaintiff's claim by means of an account annexed was in accordance with procedure of long standing in the courts of the State in presentation of claims of the nature of the plaintiff's claim.

The account for labor and materials was properly itemized and, in all respects, met the requirements of the statute (R. S. 1930, Chapter 96, Section 129) under which plaintiff justified his account.

ON EXCEPTIONS.

ACTION ON ACCOUNT ANNEXED.

At the hearing before a referee, the plaintiff offered an affidavit in accordance with R. S. 1930, Chapter 96, Section 129, and then rested without presentation of further evidence. The defendant offered no evidence, contending that the case did not come within the contemplation of the cited statute. The referee found for the plaintiff and the Judge of the Superior Court rendered his decision for the plaintiff in confirmation of the referee's report. Defendant filed exceptions. Exceptions overruled. The case fully appears in the opinion.

Milan J. Smith, for the plaintiff.

Harry E. Nixon, for the defendant.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

PER CURIAM.

The above case comes to this court upon exceptions by the defendant to the allowance by a Justice of the Superior Court of a finding by a referee in favor of the plaintiff.

The plaintiff declared by an account annexed to his writ as follows:

"Portland, Maine, February 9, 1943.

Perley E. Berry

To Edwin E. Jones, Dr.

1942

Nov. 2 to Nov. 10	To labor and services, use of truck and money laid out for cleaning out, digging out and tearing out old cesspool and building and installing a new cesspool at Pine Point, so called, at the corner of the back street and Pine Point Road in the Town of Scarborough of property belonging to the said Perley E. Berry, as follows:	
	Edwin E. Jones, truck, 16½ hours at $1.00 per hour	16.50
	Edwin E. Jones, labor, 37½ hours at $1.00 per hour	37.50
	Leon Plummer, labor, 28 hours at $1.00 per hour	28.00
	Oly Lawrence, labor, 24 hours at $1.00 per hour	24.00
	Fred Burnham, labor 11 hours at $1.00 per hour	11.00
	John Moses, labor 3 hours at $1.00 per hour	3.00
	Carting nine loads of waste at $10.00 per load	90.00
	Total amount due	210.00"

At the hearing before the referee, the plaintiff offered in support of his claim an affidavit as to the correctness and com-

pleteness of the account. This he justified under R. S. 1930, Section 129 of Chapter 96, which reads as follows:

> "In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit with all proper credits given, and that the prices or items charged therein are just and reasonable, shall be prima facie evidence of the truth of the statement made in such affidavit, and shall entitle the plaintiff to the judgment, unless rebutted by competent and sufficient evidence."

The affidavit was received by the referee and thereupon the plaintiff rested. The defendant offering no evidence, contended that the claim presented by the account annexed was not such as was within the contemplation of the statute quoted and that, therefore, the affidavit was of no effect in proving the claim. The referee ruled otherwise and found for the plaintiff.

Upon the presentation of the report of the referee to the Justice of the Superior Court for allowance, objections to the report were overruled by that Justice and thereupon the defendant filed his exceptions.

The declaration of the plaintiff's claim by means of an account annexed was in accordance with the procedure of long standing in our courts in the presentation of claims of the nature of the claim of the plaintiff, *Cape Elizabeth* v. *Lombard*, 70 Me., 396. The account was properly itemized, *Peabody* v. *Conley*, 111 Me., 174, 88 A., 411, and in all other respects met the requirements of Section 129.

The referee reduced the total of the claim in the account annexed by reason of ceiling prices established by the Federal Office of Price Administration. The question of his right to take judicial notice of the establishment of such prices is not before us. Moreover, inasmuch as such action reduced the amount

found for the plaintiff, the defendant was not prejudiced thereby.

The entry must be:

Exceptions overruled.

STATE OF MAINE

vs.

HARRY E. FITZGERALD

AND

HARTFORD ACCIDENT AND INDEMNITY CO.

Kennebec. Opinion, June 1, 1944.

Bonds for License to Sell Intoxicating Liquors. Statute Relating thereto. Evidence.

In the instant case, the obligation of the bond was not in accord with the provisions of the statute relating thereto, the statute requiring only that the bond shall be conditioned for the faithful observance of all the laws of the State of Maine and the rules and regulations pursuant thereto relating to spiritous and vinous liquors.

Liability, as prescribed by the statute, is not invoked, as the second paragraph of the bond seemed to provide, by a violation of a rule or regulation of the State Liquor Commission and a revocation of the license for any such violation.

There is nothing in the language of the statute to justify the doctrine that the findings of the State Liquor Commission were conclusive proof of the facts on which the revocation of the license of the respondent presumably was ordered.

A conviction in a criminal case is not evidence in a civil action to establish the facts on which it was rendered. It is the admission by a plea of guilty, not the fact of conviction, which is evidence; and the plea of nolo cannot be used as an admission against the accused, in a civil suit.

ON EXCEPTIONS.

Action for debt to recover the penalty of a bond. The respondent obtained a license from the State Liquor Commission to sell spiritous and vinous liquors, the license being granted upon the filing of a bond by the respondent with the defendant Hartford Accident and Indemnity Co. as surety. In the second paragraph of the bond it provided that "upon violation of any laws of the State of Maine *or the rules and regulations promulgated by the State Liquor Commission* relating to spiritous and vinous liquors *and upon the revocation of the license*— the penal sum of this bond shall be due and payable." Judgment for the State was ordered in the lower court. Respondent filed an exception. Exception sustained. The case fully appears in the opinion.

Frank I. Cowan, Attorney General,

William H. Niehoff, Assistant Attorney General, for the State.

Christopher S. Roberts, for the respondents.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. This is an action of debt to recover the penalty of a bond alleged by the State to have been given in accordance with the provisions of Public Laws 1937, Chap. 237, Sec. 4. The case is before us on an exception to a ruling of the presiding justice, who, sitting without a jury, ordered judgment for the plaintiff.

The section of the statute involved reads as follows:

> "*Bond for hotels, clubs, and restaurants.* No license shall be granted to a hotel, club, or restaurant until the applicant therefor has filed with the liquor commission a surety bond payable to the State of Maine in the penal

sum of $1,000 as liquidated damages in case of default as hereinafter mentioned. Such bond shall have as surety a duly authorized surety company or 2 individuals to be approved by the commission. All such bonds shall be conditioned for the faithful observance of all the laws of the State of Maine, and the rules and regulations pursuant thereto, relating to spirituous and vinous liquors. Such bonds shall be filed with and retained by the commission. Upon the revocation of the license of any licensee in this section mentioned, the attorney-general shall bring an action of debt in any county in the state, upon the bond given by such licensee to recover the penal sum thereof as liquidated damages."

The facts established by the record are not in dispute. The defendant, Fitzgerald, made application to the Maine State Liquor Commission for a hotel license to sell spirituous and vinous liquors in the State of Maine for the year 1943. The license was granted on his filing a bond in the sum of $1,000 with the defendant Hartford Accident and Indemnity Co., as surety. After reciting the fact of Fitzgerald's application for a license, the bond reads in part as follows:

"NOW THEREFORE, the condition of this obligation is such that if upon and after the issuance of such license the above bounden principal shall fully and faithfully observe the provisions of all the laws of the State of Maine and the rules and regulations promulgated by the State Liquor Commission relating to spirituous and vinous liquors, then this obligation shall be void; otherwise it shall remain in full force, virtue and effect.

"And the obligors, jointly and severally, for themselves, their heirs, executors, administrators, successors and assigns, do agree with the State of Maine that upon violation of said Chapter 301, of the Public Laws of 1934, or of any laws of the State of Maine or the rules and

regulations promulgated by the State Liquor Commission relating to spirituous and vinous liquors and upon the revocation of the license aforesaid for any such violation during the continuance of said license the penal sum of this bond shall be due and payable."

It is obvious that the obligation of the bond is not in accord with the provisions of the statute. The statute requires only that the bond "shall be conditioned for the faithful observance of all the laws of the State of Maine, and the rules and regulations pursuant thereto, relating to spirituous and vinous liquors." It is unnecessary to decide whether the revocation of the license by the commission is a condition precedent under the statute to an action on the bond or merely a directive to the attorney general to bring an action on such revocation. But certainly liability as prescribed by the statute does not depend, as the second paragraph of the bond seems to provide, on a violation of a law of the state or a rule or regulation of the commission, *and a revocation of the license for any such violation.*

We think that this failure to analyze the terms of the statute in question is at the basis of the misconception which the attorney-general seems to have with respect to the extent of the defendant's liability. He seeks to maintain the astounding doctrine that the revocation of the license by the commission in and of itself establishes the liability of the parties to the bond, not only as to the principal who had a right to a hearing before the commission, but as to the surety who had no such right. In other words in an action on the bond the courts of this state have no other function than to accept without question the findings of the commission as conclusive proof of the facts on which such revocation presumably was ordered. There is nothing in the language of the statute to justify such a doctrine, nor does its purpose require us to place such a construction on it, which is contrary to all established principles of law.

Mead v. *City of Boston,* 3 Cush. (Mass.) 404; *Betts* v. *New Hartford,* 25 Conn., 180; *Karlen* v. *Hadinger,* 147 Wis., 78, 132 N. W., 591; *Bishop* v. *Webster,* 154 Va., 771, 153 S. E., 832 (1930); Greenleaf on Evidence (13 ed.) Sec. 537.

In the argument for the State it was not suggested that this provision of the bond, which finds no warrant in the statute, might be rejected as surplusage. Possibly counsel for the plaintiff felt that there was nothing in the record before us except the revocation of the license to show a breach of the bond and that his case must stand or fall on the basis that such revocation was in fact a breach. The stipulation does not admit any violation of the statutes relative to the sale of intoxicating liquor. It admits only that in the Waldo County Municipal Court on a plea of nolo contendere the defendant Fitzgerald was found guilty of such violation. But the law is well settled that a conviction in a criminal case is not evidence in a civil action to establish the facts on which it is rendered. See the authorities cited above and also *Bradley* v. *Bradley,* 11 Me., 367, which by inference shows that such conviction is admissible only when based on a plea of guilty. It is the admission by the plea, not the fact of the conviction, which is evidence. See particularly *Mead v. City of Boston,* supra, 407. And the plea of nolo cannot be used as an admission against the accused in a civil suit. *Com.* v. *Tilton* 8 Metc. (Mass.) 232; 22 C. J. S., 659. See also *Hudson* v. *United States,* 272 U. S., 451, 455, 47 S. Ct., 127, 71 L. Ed., 347.

It is unnecessary to decide whether recovery can be had on this instrument as a common law bond for a violation of the provisions of the second paragraph. For, as we have pointed out, there is no evidence in the record to show a violation. The conviction is not such evidence, and if it were, the revocation of the license was not because of such conviction as the terms of the bond seem to require.

Exception sustained.

STATE OF MAINE

vs.

BELVEDERE HOTEL CORPORATION

AND

THE CENTURY INDEMNITY COMPANY.

Kennebec. Opinion, June 1, 1944.

Bonds for License to Sell Intoxicating Liquors.
Revocation of License by State Liquor Commission. Evidence.

In an action on the bond for a license to sell spiritous and vinous liquors, the State must prove a breach of the condition of it; and the finding of the State Liquor Commission as to a violation of law is not only not controlling on the question of a breach but is not even evidence of such breach.

ON REPORT.

Action of debt to recover the penalty of a bond for alleged breach of the condition of the bond. The only evidence of a breach was that the license issued to the principal on it was that the license was revoked by the State Liquor Commission for what the Commission found was a violation of the laws of Maine with respect to the sale of spirituous liquors. Judgment for the defendants. The case fully appears in the opinion.

Frank I. Cowan, Attorney General,

William H. Niehoff, Assistant Attorney General, for the State.

F. Harold Dubord,

William B. Mahoney, for the defendants.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

THAXTER, J. This action of debt against the principal and the surety on a bond is before us on report. The bond in form is identical with that considered in the case of *State of Maine* v. *Fitzgerald* decided this day. As in that case, it purports to have been given in accordance with the provisions of Public Laws 1937, Chap. 237, Sec. 4. The difference between that case and this is that here there was no criminal complaint and no conviction of the principal on the bond.

The state claims that, even though the bond is not strictly in accordance with the statute, there is no additional burden placed on the obligors by the variation from the statute, and recovery on it may therefore be had. On this theory the state argues that the only question before the court is whether there was a breach of the condition of the bond. We shall assume without deciding that this issue is before us.

The only evidence of a breach of the condition of the bond is that the license issued to the principal on it, in accordance with the provisions of Chap. 301, Public Laws of 1934, was revoked by the Maine State Liquor Commission for what the commission found was a violation of the laws of the State of Maine with respect to the sale of spirituous liquors.

What we said in the opinion in *State* v. *Fitzgerald* is controlling here. In an action on the bond the state must prove a breach of the condition of it, and the finding of the commission as to a violation of law is not only not controlling on the question of a breach but is not even evidence of it.

In accordance with the stipulation the entry will be

Judgment for the defendants.

STATE OF MAINE *vs.* CHARLES H. DAVIS.

Hancock. Opinion, June 2, 1944.

Statutes.

The statute relied upon by the prosecution was repealed previous to the bringing of the action and so the question presented was abstract and required no determination.

ON AGREED STATEMENT OF FACTS.

Complaint for a violation of Chapter 130, Public Laws 1929. The offense charged was the unlawful digging of clams for commercial purposes in the town of Trenton in violation of Rule and Regulation 42 of the Commission of Sea and Shore Fisheries. Said statute had been repealed. Report discharged. The case fully appears in the opinion.

Ralph C. Masterman, County Attorney, for the State.

O. H. Emery, for the respondent.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

PER CURIAM.

This criminal prosecution, originating in the municipal court of Ellsworth, on appeal to the Superior Court is reported for final determination upon an agreed statement of facts. Although the offense charged is the unlawful digging of clams for commercial purposes in the town of Trenton in violation of Rule and Regulation 42 of the Commissioner of Sea and Shore Fisheries and contrary to the form of the statute in such cases

made and provided it is agreed that the complaint is for a violation of Chapter 130, Public Laws 1929, a general statute.

The rejection of the recital of Rule and Regulation 42 in the complaint as surplusage is authorized. *Rawlings* v. *State,* 2 Md., 201; *Mayer* v. *State,* 64 N. J. L., 323, 45 A., 624; 1 *Chitty's Crim. Law,* 276; 31 *C. J.,* 703. But the statute, Chapter 130, P. L. 1929, relied upon, was repealed by Sec. III, Chap. 2, P. L. 1933 and does not exist. As a result the question presented is abstract and does not require determination.

Report discharged.

RULES OF COURT

STATE OF MAINE

SUPREME JUDICIAL COURT AND SUPERIOR COURT.

All of the Justices concurring, the Rule of the Supreme Judicial and Superior Courts pertaining to practice and procedure in matters arising under the Soldiers' and Sailors' Civil Relief Act of 1940 which was established January 2, 1941, is amended by adding in Paragraph 2, after the figures 1940 in the fifth line thereof, the words: "as amended by Public Law 732 of the 77th Congress approved October 6, 1942" so that said Paragraph as amended shall read:

> 2. The affidavit required by Section 200 must state the fact that the defendant is not in military service as defined in Article I of the "Soldiers' and Sailors' Civil Relief Act" approved October 17, 1940, as amended by Public Law 732 of the 77th Congress approved October 6, 1942; an affidavit upon information and belief is not sufficient.

Dated at Portland, Maine, this 10th day of August, A.D. 1943.

(Signed) GUY H. STURGIS
Chief Justice.

STATE OF MAINE

SUPERIOR COURT March 8, 1944.

All of the Justices of the Superior Court concurring, the following Rule of Court is established.

Rule 43 of the Revised Rules of the Supreme Judicial and Superior Courts, 129 Me., 519, as amended on February 26, 1934, 132 Me., 526, on August 18, 1934, 133 Me., 540, and on December 15, 1941, 138 Me., 365 is further amended so as to read as follows:

The stated days of the terms of the court in the several Counties of the State on which final action may be had on petitions for naturalization as provided by Federal law are hereby fixed as the third day of the January, April and September terms, the second day of the March term, the first day of the November term, and the first Tuesday following the third Monday of June in Androscoggin County; the second day of each term in Aroostook County; the third day of the February and October terms and the first day of the May term in Franklin County; the second day of the April term and the first day of the September term in Hancock County; the third day of the February term, the second day of the April and October terms, and the first Wednesday after the third Monday of June in Kennebec County; the second day of the February term and the third day of the May and November terms in Knox County; the second day of each term in Lincoln County; the third day of the March and November terms, and the first Tuesday after the third Monday of June in Oxford County; the second day of the January and September terms, the first day of the April term and the third day of the November term in Penobscot County; the second day of the March term and

the third day of the September term in Piscataquis County; the first day of the January term, the second day of the October term and the first Tuesday after the third Monday of June in Sagadahoc County; the third day of the January and May terms and the second day of the September term in Somerset County; the first day of the January term, the third day of the April term and the second day of the October term in Waldo County; the first day of each term in Washington County; and the second day of the January and May terms and the third day of the October term in York County.

The time for the naturalization hearings to be held as hereinbefore provided shall be 2.30 o'clock in the afternoon except that those held on the third day of the terms shall be at 11.00 o'clock in the forenoon.

GUY H. STURGIS
Chief Justice, Supreme Judicial Court.

WILLIAM R. PATTANGALL

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE SUPREME JUDICIAL COURT
SITTING AS A LAW COURT ON MAY 4, 1943, AT AUGUSTA
IN MEMORY OF

HONORABLE WILLIAM R. PATTANGALL

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL AND SUPERIOR COURTS

Born, June 29, 1865. Died, October 21, 1942.

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

HON. HARVEY D. EATON, President of the Kennebec Bar Association, opened the Exercises with the following remarks:

MAY IT PLEASE THE COURT:

We are met here today to pay tribute to our late Chief Justice PATTANGALL. A great light has been forever dimmed. That light shone in many fields. To the best of our ability we wish to recall and record our feelings of love and admiration for the great character who has left us. We pray the indulgence of this Court.

HON. CARROLL N. PERKINS then addressed the Court:

MAY IT PLEASE THE COURT:

The Kennebec Bar Association, through its committee appointed for that purpose, desires to present to this Court resolutions expressive of the love, respect and admiration of its members for WILLIAM ROBINSON PATTANGALL, late Chief Justice of this Court, and of its profound sorrow at his passing.

During the twenty-seven years of his membership in this Association he endeared himself to every member of Bench and Bar through the attributes of friendliness, kindness and sympathy, which he possessed in the highest degree. And, while we take pride in recording his accomplishments as lawyer, legislator, executive, editor, banker and jurist, it is for these qualities that we who knew him will always best remember him. He "walked with kings, nor lost the common touch."

At the testimonial dinner tendered to Judge PATTANGALL on his retirement as Chief Justice, after many deserved tributes to his mental powers and professional accomplishments had been pronounced, he said simply,—"I think I have valued more than compliments with regard to my professional ability or my work as a judge, the very kind expressions of friendship, affection and respect that have been uttered here to-night. . . . My desire for friendship and my interest in my fellowmen can not be exaggerated and will remain with me as long as I live." That is why our hearts are full today as we pay tribute to his memory.

A brief biographical sketch of his career seems here in order. His life has been so full of action, so replete with anecdote and adventure and so full of human interest, that a bare recital of its main events must be inadequate. Our State suffered irreparable loss in the failure of Judge PATTANGALL to write his memoirs. His inimitable gift of story telling, coupled with an almost uncanny memory of time, place, and events would have made the story of his rise from common seaman to Chief Jus-

tice of this Court as fascinating as any tale from the Arabian Nights.

Judge PATTANGALL was born in Pembroke, Maine, on June 29, 1865, the son of Ezra Lincoln and Arethusa Longfellow Pattangall. He came of a distinguished ancestry. Both his father and grandfather were prominent in the business and political life of their community, having been members of both branches of the Maine Legislature. He attended Pembroke schools and graduated from the University of Maine in 1884, with the degree of Bachelor of Science.

Shortly after graduation he commenced the study of law in the office of Archibald MacNichol in Calais. While a student there, he married Jean M. Johnson on June 6, 1884. Faced with the necessity of earning his own living, he left this office after a short time and shipped before the mast on his brother's bark, *Syra*, which had been built in his father's shipyard, bound for South American ports. He took his law books with him and studied at sea. He learned the science of navigation, and for two years sailed in different ships along the coasts of North and South America, advancing to the position of mate.

Later he worked in shoe factories in Massachusetts and New York. His eldest daughter, now Mrs. Katherine P. Brown of New Britain, Connecticut, was born in Brockton, Massachusetts, May 5, 1886, while he was employed as bookkeeper in Keith's shoe factory in that city. Shortly after her birth her mother died. Judge PATTANGALL returned to Machiasport in 1891 and taught in the public schools there for the next two years. In addition to the usual high school subjects of the day, he taught navigation to those boys who were desirous of going to sea.

One of his students was Gertrude Manning McKenzie, whom he married on September 27, 1892. To them three daughters were born—Mrs. Edith P. Gilman and Mrs. Josephine O'Flaherty, both of Augusta, and Mrs. Grace P. Fassett of Cambridge, Massachusetts. The widow and the four daughters

survive him, also six grandchildren and two great-grandchildren.

Judge PATTANGALL had not neglected his law studies, and while at sea, in the shoe factories, and while teaching, he continued them. In April, 1893, he went to the Calais Term of the Supreme Court, presided over by Justice Thomas H. Haskell, passed his written and oral examinations, and was duly admitted to the Bar of Maine. He immediately resigned his teaching position, and opened his first law office in Columbia Falls.

After a year there he moved to Machias, where he continued to live and practice law, with the exception of a few years in Bangor, until 1905. While there he built up a very successful law practice extending far beyond the confines of his native town. At the same time he developed an active interest in politics, and early became a leader in the councils of his party. He represented Machias in the Legislatures of 1897 and 1901.

He was editor of the *Machias Union*, a weekly newspaper, from 1903 to 1909. It was in this paper that his famous *Meddybemps Letters* first appeared. They purported to have been written by a country newspaper correspondent, writing from various places in the State under the pseudonym of "Stephen A. Douglas Smith." They were masterpieces of such brilliant wit and political satire as this State had never seen. In the words of Arthur G. Staples, who in 1924, as editor of the *Lewiston Journal*, published them together with the *Hall of Fame* and other writings and addresses of Judge PATTANGALL in book form,—"They made an entire State laugh. They began to undermine the very foundation of Republican party domination. For the first time the sacred careers of the 'great' were dissected by the simple humor of 'Stephen A. Douglas Smith' under whose pseudonym and by whose pictured representation in crude wood-cut, these letters appeared."

From then on until his death, Judge PATTANGALL became and remained a state-wide political figure.

In 1905 he accepted an invitation to come to Waterville and edit the *Waterville Sentinel*. He moved his family to Waterville, where he remained until 1915. While in Waterville he not only found time to be a newspaper editor, but continued to expand his ever-increasing law practice. He represented Waterville in the Legislature of 1909 and 1911. He was Mayor of Waterville in 1911, 1912 and 1913, and was elected Attorney General of Maine in 1911 and again in 1915. He was during this period the leader of the Democratic party in Maine.

It was during this period, in 1909 and 1910, that he continued to caricature the Republican leaders of the State in a series of biographies entitled *Maine's Hall of Fame*. They are of unusual intellectual and literary value and played no small part in turning the political balance of a State.

In 1915 Judge PATTANGALL moved with his family to Augusta. He continued to take an active and prominent part in the political life of his state and nation. He was several times a candidate for Congress and for Governor. Had he belonged to the majority party, he would have held many high political offices. He would have graced a seat in the United States Senate. He was a delegate to the Democratic National Conventions in 1920 and 1924, and New England member of the subcommittee on platform.

With the advent of the New Deal, Judge PATTANGALL felt that the Democratic party had left him. He became prominent in the councils of the Republican party, was a delegate to the Republican National Convention in 1936, and served on its committee on resolutions. He continued his political writings and manifested a keen and sincere interest in the political life of his state and nation up until the day of his death. He served as trustee of the University of Maine from 1913 to 1916; was a member of the International Tax Conference for Maine in

1909-1912, and was counsel for the United States Shipping Board in 1919.

Meanwhile he had not neglected his private law practice. As Attorney General he had achieved an enviable record in the successful prosecution of murder cases, as well as in the performance of the other duties of the office. He had become one of the foremost trial lawyers in the state, and was engaged as counsel in the most important cases of all kinds, both civil and criminal. He never attempted to specialize in any one field. The stories of his cases and what he said and did will live forever in the legendary lore of the lawyers of Maine. Regardless of party, his attainments and qualifications for high judicial office could no longer be overlooked.

On July 2, 1926, although then a Democrat, he was appointed Associate Justice of the Supreme Judicial Court of Maine by Republican Governor, Ralph O. Brewster. He sacrificed a very lucrative law practice to serve his state. On February 7, 1930, he was elevated to the Chief Justiceship by Governor William Tudor Gardiner. On July 16, 1935, having reached his retirement age, he resigned as Chief Justice, but did not retire from active life. His record as a member of this Court will be reviewed by other speakers. Suffice it to say here that as a Judge he administered the duties of this high office with honor and distinction. He was honored by his Alma Mater with the degree of Master of Science in 1897, and in 1927 with the degree of Doctor of Laws. Bowdoin College conferred on him a similar degree in 1930.

In 1932 the Maine Congressional delegation urged President Hoover to appoint Judge Pattangall as successor to Associate Justice Oliver Wendell Holmes of the United States Supreme Court. Later, during the first years of President Roosevelt's administration, he was mentioned as the Chief Executive's choice for the post of Attorney General in his cabinet. He was well qualified to have filled either of these high offices.

While a member of this Court he was largely responsible for far-reaching changes in the judicial system of Maine. Also, during the depression years, he was called upon, as Chief Justice, to supervise the receiverships and in some cases the reorganizations of many banks of Maine. The responsibility was tremendous and the course was uncharted. He administered the affairs of these banks with efficiency and common sense.

Among the banks reorganized by him was the Augusta Trust Company, under the new name of Depositors Trust Company, and immediately on his retirement from the Bench, he became its first president, and later chairman of its Board of Directors. He organized a law firm and continued to engage in the active practice of law for the following seven years, up to within a few weeks of his death. He personally appeared and argued before both courts and juries during this period, and was retained as counsel in many important cases.

The passing years brought no diminution of his mental powers, but took their toll of him physically. Active until the last in banking and legal matters and still exercising a keen appraisal of public men and events, on the 21st day of October, 1942, attended by his devoted wife, and surrounded by his loving children and grandchildren and a host of personal friends he left us.

Others may well speak of his brilliant and wonderful mind, his powers of analysis, his skill as a cross-examiner, his eloquence as a pleader, his wit, satire, humor and rare intellectuality. Many have attempted to analyze and describe these qualities in him which can only be described in superlatives. In any place and time he would have been a leader.

But we members of Kennebec Bar, his closest associates and true friends, choose best to remember him, as I said in opening, for his inspiring qualities of heart; for his love and solicitude for his family; for his kindness and help to those in trouble, for his sympathy and assistance for the young lawyer in his inex-

perience; for his toleration of mistakes and his patience with wrongdoing; for his love of his fellow man, his hatred of snobbery and false pretenses; and above all, for his loyalty. For all these God given qualities, we chiefly mourn him today. And so it is here

RESOLVED that in the death of WILLIAM ROBINSON PATTANGALL the State of Maine has lost one of its most eminent of champions, one of its ablest jurists, and one of its most distinguished citizens and sons.

RESOLVED that the Bench and Bar of Maine have collectively and individually lost a leader and true friend and a living example of charity and brotherly love.

RESOLVED that these resolutions be presented to this Court with the request that they be entered upon its permanent records, and that a copy be sent to his widow in token of our respect and sympathy.

JOHN E. NELSON
CARROLL N. PERKINS
ROBERT B. WILLIAMSON
HERBERT E. LOCKE
ERNEST L. GOODSPEED
FRANCIS H. BATE
WILL C. ATKINS

For Kennebec Bar Association.

JAMES B. PERKINS, ESQ., was the next speaker:

MAY IT PLEASE THE COURT:

We are met together today to honor the memory of WILLIAM ROBINSON PATTANGALL—a great American and a former Chief Justice of this Court.

In paying my tribute to that memory, I speak for the Bar of Maine. My association with him for many years, shared by others, began where we were known as among the younger members of the Bar. We cherish the memory of his kindly regard and affection for us. We know that we loved him.

WILLIAM ROBINSON PATTANGALL was born in Pembroke, Maine, and being of a race that for generations past had gone down to the sea in ships, while reading law, was mate of a bark, sailing the ocean upon which time appears to write nothing but does in fact write so much, where he saw the beauty of an everlasting wisdom in the universe of earth and sky and sea, and learned to understand that wisdom.

For a time he was a teacher in the town of Machiasport. It was there that he met and married that sympathetic helpmate and congenial companion who has stood by his side throughout the years and presided over his home with such grace and dignity.

Upon his admission to the Bar, he began the practice of law at Columbia Falls in his home county of Washington, and later he practiced in Bangor, Waterville and Augusta, moving ever westward towards the highest honor of his full and abundant life, the office of Chief Justice of his native state. His life was replete in attainment and he gave to his state the best that he had and it was much.

While busy with the practice of the law, he found time for some years to be an editor. Four times he was a member of the Maine House of Representatives; twice Attorney General of his state; three times Mayor of his adopted Waterville; a candidate for Congress and for Governor; associate justice of the Su-

preme Judicial Court of Maine and finally its Chief Justice. Yet he found opportunity to write the *Meddybemps Letters* and the *Hall of Fame*, unsurpassed by any writer, in humor and satire.

Few have possessed his ability as a public speaker. His style was simplicity itself. Without raising his voice, he held the attention of an audience with that clarity of expression which is the possession of only a very few in a generation. To be able to make people laugh is an art, which was his to a high degree.

As a jurist, his record is established for eternity by the one hundred twenty-nine opinions from *Loud* v. *Poland*, 126 Maine 45, to *Eastern Trust and Banking Company, Trustee* v. *Edmunds et als.*, 133 Maine 450, where he spoke for this court and the two dissenting opinions, to which he brought the great ability that was his and left these models of judicial expression as landmarks in the law of our state. In these various opinions, he gave expression to those concepts of justice, which were so dear to him, whose forebear had stood at Runnymede.

To him and to the late Chief Justice Wilson, the Bar of Maine is indebted to a large degree for the reorganization of our judicial system which has worked so well and has enabled the Bench and Bar of this state to perform their respective duties most efficiently and to maintain that high standard of judicial opinion and service, for which the Bench and Bar of Maine have been famed since their inception.

At *nisi prius*, there never was a more kindly or courteous judge, and he will be remembered always with deep affection by all the members of our Bar, especially by those whose good fortune it was to make their first appearance in court before him.

To those of us, whose privilege it was to have been associated with him in the general practice of the law, he was more than friend. When success crowned our efforts in the trial of any cause, his pleasure knew no bounds; but when the result was not so satisfactory to our clients, there was never any criticism,

just a few words of kindness, and perhaps the statement, "Well, what do we do next?"

He was generous to a fault.

A devoted husband and father, his home was the center of his universe. It was here that he was at his best. There was never a more charming companion or a more brilliant conversationalist, and as a raconteur he was without a peer. At his fireside, of an evening, his friends were accustomed to gather and there discuss the problems confronting our state and nation. Here we were privileged to receive the benefit of his great ability, his keenness of analysis, and that marvelous memory which would enable him to discuss so entertainingly the political history of our own and earlier times.

Great success at the Bar was his. The equal of any as a trier of causes, able jurist, a great Chief Justice, a leader in the political life of his state and nation, teacher, editor, author, master of satire and humor, unexcelled as a teller of stories, he was always loyal to his friends in success and in adversity.

With his passing there was established an institution in the hearts of the Bar of Maine, and a tradition in the annals of the jurisprudence of our state.

"A tall pine has fallen."

"And, when the stream
Which overflowed the soul was passed
away,
A consciousness remained that it had
left,
Deposited upon the silent shore
Of memory, images and precious
thoughts,
That shall not die, and cannot be de-
stroyed."

HON. ROBERT CONY, Justice of the Superior Court, then addressed the Court:

MAY IT PLEASE THE COURT:

On June 29, 1865, in an obscure little seacoast village in Washington County was born a baby boy. Doubtless the neighbors discussed with each other the fact that staid, conservative Captain Pattangall and his good wife had a new son, how much he weighed, the color of his hair, and what he was to be named, together with a discussion of the stirring events of the great Civil War then just passing its crescendo. There was nothing of pomp or circumstance in this commonplace event to indicate or intimate that this child was to become the most colorful figure and possessor of the finest mind in the State of Maine for the next three-quarters of a century. Yet such is the literal truth. Giving play to imagination, and looking back across the years, we wonder if there was the blood of leaders flowing through his veins from the paternal or maternal side, or both; whether the near-by sea with its ever-changing picture, with its depth and its power, had its influence on the life of this lad, or whether the nearby everlasting hills, from which cometh our strength, helped to etch and chisel the character that was his. This we do not know.

What we do know is, that this is the usual and the common of those who have led us, and this is forever the power and the glory of this Democracy which we call America. Someone has written:

"Dear little town of homely name,
Out from you the leaders came.
Out from you with joy and laughter
They sought the Truth and followed after.
Dear little town
The birth of them
Makes you akin to Bethlehem."

He was born poor. Had he been born rich, had he been more trained in the curriculum of the great Universities he might not have been the Pattangall we knew. After finishing at the University of Maine he roughed it for several years as a sailor before the mast, as a ship's officer, in shoe factories and other industries. This gave him an understanding of the problems of the humble that was one of the strong influences in his later career. Someone has said "not from the heights, but up through tribulation and toil and suffering come the leaders of a free people, the founders, the guardians, the saviours of free institutions." Wealth is a good thing; we all want it; education is better; all should seek it. But wealth and education in these days have their dangers. Those who have it may be jostled about in the actualities of life, neither understanding or understood. And it has been said that the day could come when it would be easier for a camel to pass through a needle's eye than for such to reach high places in public confidence.

His was not a stream-lined life. Shoulders four-square, with flashing eye, he battled for his causes,—always fearless; sometimes uncompromising; sometimes perchance following a forlorn hope; sometimes with the flush of victory close at hand, he unsheathed his sword and threw away the scabbard. Yet tender, gentle, and always courteous to the Court and to his opponent and others. This great pine of Maine,—the greatest Roman of our day.

We of the Bar are prone to think of Chief Justice PATTANGALL in his capacity of an advocate and as a Judge. We think of the some one hundred and thirty opinions he wrote, in the Maine Reports from 126 Maine to 133 Maine, with such clarity and understanding that literally he who runs may read; we are apt to think of him as an advocate without a peer in many important cases, both civil and criminal. We think of him too, later, when in the trying days of the depression he as Chief Justice was called upon to carry a heavy burden re-establishing

normal banking in the State of Maine when so many institutions were in difficulties and when it almost seemed the pillars of the temple were falling about us. Few will ever know or appreciate what he did and how he worked to save a most critical situation. He later became the first President and, later, the Chairman of the Board of an institution that has become one of the most important and successful in the State. No small part of the credit of this accomplishment belongs to his ability and devotion, his foresight and understanding. But that was only one side of his many-sided character. He could have been a great writer or orator outside of the law. The late Arthur G. Staples once wrote of Judge PATTANGALL:

"When I heard him speak I heard a low voice most beautifully attuned, with minor chords in it and things I call nuances, ... He had a singular power of picking the right word out of all the words in the world—the one that fitted. Such men have been called wordsmiths—men who with deft touch put exactly the right turn to the article they are forging on the anvil of speech ... This is no common gift in Mr. PATTANGALL'S case. I would say there are not ten men in America who equal him in sustained power of plain statement made interesting, delightful, invigorating and uplifting by wit, satire, lucidity and coherence ... his mellow voice; his liquid phrasing; his sweet flow of words, as fitting as each to the other as the words of pure prose or perfect verse could be; it introduced a new style of oratory in Maine. Few had ever possessed it. Chief Justice John A. Peters had it, to whom people listened unaware that the art of his simplicity was the purest evidence of difficult speech,—as the easiest writing is the hardest to imitate."

Staples proceeds to say "it is odd that a person who speaks as well as he, so easily without notes, should at the same time be a super-eminently great writer. I know that as an editorial writer he has powers that would command tremendous influence in the metropolitan field. The swift analysis; the merciless truths; the follies and foibles; the grotesqueries; the exag-

gerations and the sportive rudeness of the *Meddybemps Letters* never have been equalled in Maine . . . He may have been critical and impertinent and sometimes seemingly merciless, yet he was never dull or wholly unkind. Those who are qualified to know say that he deserved a place in Maine literature."

What was it that drew men unto this man? Was it his sheer ability as an advocate, writer, humorist? No. Men sometimes admire these things and even respect them, but they do not love the possessor. One whose caustic wit sent deadly shafts which hit home, is not loved.

Judge PATTANGALL was loved by those who knew him best because he was of the earth earthy. In close friendship he was not the hard, brilliant, ruthless and bitter fighter,—but the warm-hearted, broad-minded, generous and delightful companion, the scholar and the gentleman. I do not believe any humble man, who was worthy, ever went to him and was sent empty away,—as no high or mighty ever made him cringe.

He did not worship common gods. He was doubtless glad to receive substantial fees from those who could afford to pay. But if we judge his life correctly these fees in and of themselves did not mean much to him. In this respect he reminds one of the late Benedict F. Maher of this Bar. On an occasion when I knew Judge Maher had done a most kindly and unselfish thing, I remarked to him that I wondered why he had taken the pains and trouble and time to do this act. He replied "I have lived my life in a peculiar way. I believe I could have made myself rich had I so chosen, but I did not care. I have gone through life doing things I wanted to do, and helping those I wanted to help." Judge PATTANGALL was like that. He did not set up high personal marks for himself. He went smiling through,—a minstrel and a crusader. He did not take himself too seriously, and he sometimes punctured hypocrisy and conceit in others in a way they never forgot.

Judge PATTANGALL was certainly a representative American of his age. His faith, his convictions, his idols and his preju-

dices were the faith, convictions, prejudices and idols of Main Street, U. S. A. He had faith in America and in Main Street. He believed in the Constitution of the United States as firmly as if its pages had been written in tablets of stone and handed to a Chosen People. He believed in national independence and personal independence. He hated to take orders and never followed "party lines." So he walked down "Main Street" of our State sometimes alone, distinguished-looking, more gifted than the others on the street,—a man to look up to, but who never looked down on you.

Everybody disagreed with him at some time or other, but you disagreed with him as men disagree on cracker barrels from Maine to Oregon, and in the smoking car and bus. He bolted party discipline as millions of Americans bolt every election. But no matter how he bolted, he was not an outsider. He was rather a great insider. He swayed to breezes like a great tree sways,—with roots ten feet under the ground.

The death of "Patt" hits home. It is like reading that an era was ended.

In Robert Tristram Coffin's book *Kennebec,* he makes reference to the dwellers along our river. He said: "they do not always talk; they do not always agree with you; they bend against the wind. In Washington County, Maine, there is probably as pure a stock of the old settlers as any County in the United States; some of them Bend Against the Wind." That was a part of the character of "Patt,"—the courage and the conviction and the faith "To Bend Against the Wind."

He was truly a son of Maine. He had opportunities to go elsewhere, where he would doubtless have distinguished himself in the great centers. He could have been a great statesman and would doubtless have made a place for himself in the seats of the mighty of the nation had he been less independent. Perhaps he loved Liberty more,—Liberty of Thought and Action,—than any of these things.

For some imperfection of our nature, which we cannot lay aside, it is said that the fullness of the heart and of admiration cannot fully show itself

"Till the sacred dust of death is shed
On each dear and reverend head,
Nor love the living as we love the dead."

If it be so, nevertheless it is a part of our nature that when thus liberated from the threat and fear and competition of the living,—after this obscuration is removed, it is an honest and not a vague and extravagant judgment that gives due prominence to life and character and removes the shade.

The looms of time are never idle, and the busy fingers of the fates are ever weaving, as in a tapestry, the many threads and colors that make up our lives, and when these are exposed to critics and admirers there shall be found few of brighter colors or of finer or nobler pattern than this life of WILLIAM R. PATTANGALL.

In the last week of his life on this earth I passed an evening with "The Chief" as those about Augusta sometimes loved to call him. The Angel of Death was in the sick room, but his mentality was not flagging. We discussed people and events, lawyers and cases, and things political throughout the State of Maine. He was interesting and interested, as always. He remarked, wistfully, that he had probably tried his last case. He was doubtful as to the future, and yet, surely "in his heart there was some Late Lark Singing" as he looked toward the quiet West.

Morturi Salutamus—We who are about to die salute you. We for a moment pause here to salute the Memory of one of whom it may be properly said Was the greatest among Us.

"Man goeth to his last resting place
And the mourners go about the street."

As I saw him near the end I think the beautiful lines of Robert Louis Stevenson, which are engraved on his stone in the far away Pacific, would be the most appropriate as reflecting the attitude of the one who has left us:

"Under the wide and starry sky,
Dig the grave and let me lie.
Glad did I live and gladly die,
And I laid me down with a will.

This be the verse you grave for me:
Here he lies where he longed to be;
Home is the sailor, home from sea,
And the hunter home from the hill."

HON. HAROLD H. MURCHIE, Associate Justice of the Supreme Judicial Court, speaking for the Washington County Bar Association, then spoke as follows:

MR. CHIEF JUSTICE, MY ASSOCIATES, AND MEMBERS OF THE BAR:

Exercises intended to commemorate the life and public service of WILLIAM ROBINSON PATTANGALL would be incomplete indeed if some member of the Washington County Bar did not say a brief word. The privilege of doing so falls to me. I hope it is proper for me to speak from this particular position on the Bench, which he occupied, in this court-room, just once. Our reports of decisions disclose that he was assigned to sit here at the Law Term which convened on the fourth Tuesday of January, 1930—just prior to his accession as Chief Justice. His assignments for the March and December Law Terms in the preceding year were to the corresponding seat in the Supreme Judicial Court Room at Portland. It is perhaps worth while to note that at each of these three Law Terms, the first held under Chief Justice Wilson, and the two latter under Chief Justice Deasy, four of the five sitting Associate Justices were later to preside over the Court.

During the considerable span of years when the influence of WILLIAM ROBINSON PATTANGALL, personal, political and judicial, was to stand so clearly in the ascendant, he was known throughout the State, and outside the State, as a citizen of Waterville, or, later, of Augusta, and as a member of the Kennebec County Bar. We, in Washington County, have no desire to detract in the slighest degree from the prestige that accrues rightly to Kennebec County from the lustre of the public services of Chief Justice PATTANGALL. In the fame of the man, however, separate and apart from that of the jurist, we claim the right to participate. He was born and reared; he secured his legal training; and he conducted his early practice at law—in Washington County. His great mental ability, his peculiar ap-

titude for politics, and for law, and the talent responsible for his later achievements were all apparent, and recognized, before he left his homeland to engage his capacities in larger and more fruitful fields.

Chief Justice PATTANGALL was not merely a formidable advocate, both before and after the period of his tenure on this Court, and a logical, clear-thinking and forceful jurist during that time but, except when his judicial position precluded his participation in politics, he was the wielder of a very considerable political influence, by the spoken, and by the written, word. His distinction on the Bench (and as a banker) may belong entirely to the County of his adoption, but in all the other fields where his accomplishments were noteworthy, his performances after his migration from home did no more than add renown to a reputation that was already established.

After what has been said by those who had immediate, direct and personal contact with WILLIAM ROBINSON PATTANGALL during the years of his state-wide activity at the Bar, and on the Bench, recounting episodes of his law practice in early and formative days would represent anti-climax, especially for one who could narrate them only on the basis of hearsay or legend. He was admitted to practice fifty years ago, when this Court was headed by the great Chief Justice Peters, and when its junior Associate was Mr. Justice Wiswell, destined, although that fact could not then have been known, to succeed the former as the incumbent of the high office of Chief Justice. In those far-gone days, he whom we now commemorate battled in the forum of the courts of Maine, principally, with members of the Bar practicing in Washington County. Any of these, his early associate, or opposing, counsel, if living, could regale this gathering with anecdotes, experiences and contests at law which would picture the younger PATTANGALL, but no one of them now survives, nor has for many a year.

These services are of interest, in Washington County, not merely to the members of the Bar, but to all the people. They

knew Chief Justice PATTANGALL only as their counterparts throughout the State knew him—portrayed by his activities in the closing decades of his life. They knew WILLIAM ROBINSON PATTANGALL, however,—the man, rather than the incumbent in judicial office—in a manner both direct and personal. They regarded him as an individual, always, as one of their own. They followed his career, step by step, with keen attention. They took pride and satisfaction in the things that he accomplished. Interest between him and them was not one-sided. He never permitted his old-home contacts to lapse. He maintained, throughout his life, the friendships of his youth, so far as his contemporaries survived. This was, necessarily, in constantly decreasing number, for he outlived the usual span of life, but his field of friendship in the home-land constantly expanded, for he developed many close associations with men of younger years.

The people of Washington County glory in the fact that WILLIAM ROBINSON PATTAGALL became after leaving them, if he was not already, one of the outstanding advocates of the State of Maine, in all its history, that he earned distinction as a member of this Court, and as its fifteenth Chief Justice; and that, while traveling the road which led to the later eminences, he became, as has already been largely enumerated, a power in the State's halls of legislation, its Attorney General, the candidate of his political party for Member of Congress, and for Governor, and, without reference to the seeking, or to the holding, of office, that he was long the recognized leader of his political party in the State, possessed of a substantial influence in the Nation. His stature grew with the years, and with his opportunities, but "the makings" trace back to the days, and to the fields, of his origin.

The people of Washington County are but a part of all the people of the State of Maine in mourning the loss of Chief Justice PATTANGALL, but their thought is also of the man. With them his memory will long be fresh, not merely for his suc-

cesses in law and in judicature, but because of his personality. In Washington County he will ever be recalled, above and beyond all else, as a worth while and faithful friend, a very human individual, known affectionately, in every city, town and hamlet, by the intimate appellation—"Patt."

HON. JAMES H. HUDSON, Associate Justice of the Supreme Judicial Court, next paid the following tribute to the memory of Judge PATTANGALL:

MR. CHIEF JUSTICE STURGIS, JUSTICES OF THE COURTS, AND BRETHREN OF THE BAR:

WILLIAM R. PATTANGALL, the fifteenth Chief Justice of the Supreme Judicial Court of Maine, died at his home in Augusta on Wednesday, the twenty-first day of October, 1942, at the age of seventy-seven years, three months, and twenty-two days.

Including the present incumbent, this Court has had eighteen Chief Justices. John Appleton served longest,—twenty-one years, from October 24, 1862 to September 19, 1883. Including his service as associate, he was a member of this Court thirty-one years, exceeded only by the thirty-five years of service by Associate Justice Walton. Luere B. Deasy served the shortest time, not quite four months, from October 12, 1929 to February 7, 1930, but his total incumbency on this Bench covered a period of eleven years and five months.

All of our Chief Justices, excepting two (Deasy and Dunn, self-educated to a very high degree), have been college graduates.

Bowdoin:	Tenney	1816
	Appleton	1822
	Emery	1861
	Wiswell	1873
	Sturgis	1898
Dartmouth:	Weston	1803
	Shepley	1811
	Savage	1871
Colby:	Whitehouse	1863
	Cornish	1875
	Barnes	1892

Harvard:	Mellen	1784
Brown:	Whitman	1795
Yale:	Peters	1842
Maine:	Pattangall	1884
Bates:	Wilson	1892

Exhibited in my chambers is a unique collection of photographs. I deem it priceless. It consists of individual pictures of all of our Chief Justices. With sincere appreciation of the invaluable service each and every one of them has rendered to this State, I proudly read their names in the order of their tenure:

1. Prentiss Mellen, Portland, 14 years, 3 months.
2. Nathan Weston, Jr., Augusta, 7 years.
3. Ezekiel Whitman, Portland, 7 years.
4. Ether Shepley, Portland, 7 years.
5. John S. Tenney, Norridgewock, 7 years.
6. John Appleton, Bangor, 20 years, 11 months.
7. John A. Peters, Bangor, 16 years, 4 months.
8. Andrew P. Wiswell, Ellsworth, 6 years, 11 months.
9. Lucilius A. Emery, Ellsworth, 4 years, 7 months.
10. William Penn Whitehouse, Augusta, 1 year, 8 months.
11. Albert R. Savage, Auburn, 4 years, 2 months.
12. Leslie C. Cornish, Augusta, 7 years, 8 months.
13. Scott Wilson, Portland, 4 years, 7 months.
14. Luere B. Deasy, Bar Harbor, 4 months.
15. William R. Pattangall, Augusta, 5 years, 5 months.
16. Charles J. Dunn, Orono, 4 years, 4 months.
17. Charles P. Barnes, Houlton, 7 months, and
18. our present Chief Justice, Guy H. Sturgis of Portland—

who God grant may remain with us to serve for many years yet to come.

The State of Maine was exceedingly fortunate in its first Chief Justice, Prentiss Mellen. Born in Sterling, Massachu-

setts, on October 11, 1764, he was the eighth of nine children of the Reverend John and Rebecca (Prentiss) Mellen, daughter of the Reverend John Prentiss. In October, 1788, he was admitted to the Bar in Taunton, Massachusetts. In July, 1792, he removed to Biddeford. Mr. William Willis, in his *History of the Law, the Courts, and the Lawyers of Maine*, said:

> "Here he commenced that sphere of successful and honorable practice which placed him at the head of the bar in Maine, and at the head of its highest judicial tribunal."

Chief Justice Mellen served from July 1, 1820 to October 11, 1834. For the three years prior to his appointment, he had been a member of the United States Senate. He was chairman of the Board of Jurisprudence by whom the first revision of the laws of Maine was made in 1821.

Following retirement from the Bench, he was chairman of the committee to revise the statutes. Recently in tracing back a statute to its origin I noted on page VII of the Revised Statutes of 1841 an eloquent tribute paid the Chief Justice by his revision committee associates, Philip Eastman and Ebenezer Everett. They said:

> " . . . he entered upon this work, with the ardor of youth, the vigor of middle age, and a maturity of intellect, ripened by the suns, yet scarcely chilled by the frosts of seventy-four years. By him the major part of this work was prepared. This crowning labor of his useful life, he was permitted to accomplish, and to witness its adoption by the legislature, but not its publication. On the thirty first day of December, 1840, he rested from his earthly labors, in the seventy seventh year of his age."

Chief Justice Mellen set a high mark for those who were to follow him, and yet all of his successors without exception have

proven their supreme fitness for the performance of such highly important and indispensable service to the State.

WILLIAM ROBINSON PATTANGALL was pre-eminently well qualified to take his place in such a distinguished group. Much of experience he had obtained from his many contacts in life.

He was born in the village of Pembroke in Washington County on June 29, 1865, son of sea captain Ezra Lincoln and Arethusa (Longfellow) Pattangall. He worked in shoe factories in Massachusetts, followed the sea, and taught school in Pembroke and Machiasport. He received his education in the common schools of his native town and the State University. He studied law with Honorable Archibald MacNichol of Calais. Admitted to the Bar in Washington County at its April Term, 1893, he started practice in Columbia Falls. Ambition, backed by extraordinary ability, took him to larger centers and he practiced his profession with much success in Machias, Bangor, Waterville, and Augusta. He served four terms in the Legislature. He wrote books compelling attention. He was a newspaper editor with an uninfluenced pen. Never was he the puppet of any man. He was in the forefront of political activities. Always was he a leader. He had strong likes and dislikes. No one could be a more staunch friend. His written words could and did stir up wrath and make personal enemies for himself, particularly in his younger days and especially when he wrote his *Meddybemps Letters* and *Maine Hall of Fame*. But this should be said: what he wrote he meant; he was deadly in earnest; his satire was founded on what he regarded to be truth.

When my law school class graduated in 1903, our distinguished property professor, John Chipman Gray, gave us a parting word. He bade us as we entered the practice of our profession always to be free from "guile." Of this Chief Justice PATTANGALL had none. Deceit and treachery were foreign to his nature.

No man who practiced law in this State within my observation had greater experience or was more successful as a trial lawyer. The many cases he tried, civil and criminal, in both State and Federal courts, were usually of vast importance, requiring excessive skill and learning. He became Maine's leading trial lawyer. During his first year as Attorney General, it is said he prosecuted fifteen homicide cases, securing convictions in all but one. Still, he was as distinguished a defender as prosecutor.

His marvelous trial success was due in large part to his remarkable skill as a cross-examiner and particularly to his keen, analytical mind and possession of a superabundance of common sense. He was not oratorical, nor did he attempt to be. He grasped the issue and kept to it. He was not old style in advocacy. He talked *with* the jury, not *over* it. His arguments were clear as crystal. He was neither vehement nor invective. He appealed to reason, with an occasional use of wit and sarcasm. This, however, was with a face smiling. He had a most tender heart.

His services were much sought as counsellor in many business matters of large concern both in and out of the State.

He became nationally known. He was mentioned for Attorney General of the United States, and also was considered for appointment to the United States Supreme Court, either of which positions he would have filled with great distinction. It may truly be said he would not have signed the majority opinions in the United States Supreme Court Gold Clause cases, Soon thereafter he came into my adjoining office and read me this letter he had just dictated to Mr. Justice McReynolds, who had written the dissenting opinions, concurred in by Justices Van Devanter, Sutherland, and Butler:

"Dear Judge: Thank God we have four lawyers on the United States Supreme Court."

Signed: "W. R. Pattangall."

I expressed doubt as to the advisability of sending it. In a few moments he came back with a new draft. It read:

"My dear Justice:

Thank God for the presence on the Supreme Court Bench of you and the three Justices who joined in your recent dissenting opinion. Unless Constitutional Government has gone beyond recall (which I can not yet believe) the future will justify your sound judgment, courage and loyalty.

Sincerely yours,

W. R. Pattangall."

Upon inquiry I told him I did not consider it quite as objectionable, but still from it one could draw an inference at least that the other five members of the Supreme Court should not be on that Bench, to which he replied with emphasis that that was just what he meant. Chief Justice PATTANGALL was fearless, a man of strong convictions which he was always willing to express and defend.

Governor Ralph O. Brewster appointed him to this Court on July 2, 1926 to succeed Mr. Justice Morrill. As Associate Justice he served three years and seven months, when on February 7, 1930, he was appointed Chief Justice by Governor William Tudor Gardiner, which office he held for five years and five months until his resignation on July 16, 1935, his entire length of service totalling exactly nine years. He wrote one hundred thirty-one opinions (not including memoranda decisions), forty-two as Associate Justice and eighty-nine as Chief Justice. They are clear, convincing, and well fortified by authority and logical reasoning. They witness his legal learning and unusual power of analysis, as well as his ability correctly and sensibly to apply principles of law to involved factual situations. In all causes he desired that complete justice should always be accomplished.

He had been Chief Justice approximately three years when the nation-wide banking debacle of 1933 prostrated this State. We had never had such an experience. New emergency legislation was needed to cope with the situation. For the form and substance of these new laws, the Chief Justice was largely responsible and to him properly belongs much of the credit therefor. The performance of his ordinary duties was onerous enough, but the bank litigation heaped upon him a vast amount of additional work. The equity docket in Kennebec County alone reveals that before him more than twenty bank receiverships were then instituted, which required many conferences and hearings with reference to appointments of receivers, bonds to be given, appraisals to be made, reports to be passed upon, loans from the Reconstruction Finance Corporation to be obtained, segregation of assets to be determined, double assessments on stockholders to be decreed, dividends to be declared, as well as countless other things to be done. Hardly a day was free from receivership service. The Chief Justice discharged these duties with much ability and thereby rendered invaluable service to the citizens of this State.

It was not to be expected that he alone could carry all of these receiverships through to completion. After some months, but following the more important first stages of the liquidations, he put other judges in charge of some of these receiverships, but kept to himself more than his share of this burdensome and time-consuming work.

Upon my elevation from the Superior to the Supreme Judicial Court on November 20, 1933, Chief Justice PATTANGALL asked me to come to Augusta to assist him and here to do my judicial work. I came and occupied the adjoining office, which had been that of the late Mr. Justice Farrington, my predecessor on the Bench and who was not only a dear friend of mine but my class- and roommate at Harvard Law School. Thenceforth I was almost in daily contact with the Chief Justice until

his resignation. I learned really to know him, to respect and to love him. One's own father could not have been more kind or considerate. What a pleasure it was to have his almost daily companionship. To discuss legal problems with him was a much appreciated privilege. Morning after morning he came in, sat with me, smoked his cigar, discussed pending cases, and most interestingly related actual incidents of his long career. Neither boresome nor repetitious, he was a most delightful raconteur.

Upon my appointment to the Superior Court in 1930, I carried with me from county to county a loose-leaf book, in which I make it a practice to record amusing and interesting anecdotes related to me by attorneys throughout the State. In this book are recorded many humorous but true stories later related to me by Chief Justice PATTANGALL and others, a few of which I now tell. They were not told to me in confidence.

First let me say that the Chief Justice—he so said to me—did not commend eulogies at funerals, but thought that later it was most appropriate that services such as these (not funeral in character) be held by the Court at which members of the Bar and others should speak of the deceased with candidness and picture him in accordance with fact and truth.

No true portrayal of Chief Justice PATTANGALL is possible without special mention of his keen sense of humor. Wit also he possessed to a very high degree. They helped him over many a hurdle of burden and stress. Their disclosure was a source of great pleasure and entertainment to his many friends.

One day he came into my chambers and smilingly said, "Did you see that they have adopted a code for the barbers under this NRA?" I said, "No." "Well," he said, "I have been trying to figure out how they got that into interstate commerce. It must be that it is on the ground that if a man has his hair cut he must intend to go out of the State, to Boston or some place, and that takes him into interstate commerce."

Once while holding court in Washington County, he was

Errata

On opposite page read *funereal* for *funeral*.
The words in parentheses should read
(not funereal in character).

presiding over a criminal case. He had delivered his charge when up stepped to the Bench counsel for the respondent and sought additional instructions on reasonable doubt. Upon provoking insistence the Judge turned to the jury and said, "Mr. Foreman and Gentlemen of the Jury: I have already instructed you as to reasonable doubt, but at the very special request of the respondent's counsel I am giving you this additional instruction. If you, Mr. Foreman, or any member of this panel, has the *slightest* doubt as to the guilt of this respondent, you may bring in a verdict of not guilty." The verdict was guilty. Exceptionable or not, no exception was taken.

Mention already has been made of the kindness of his heart. I saw many instances of it. His door never was shut to one in trouble. In the dead of a severe winter an attorney came in and said that he was going to take possession of a cook stove, title to which his client claimed under a foreclosed chattel mortgage that had been given by a poor man with a family in distress. The Judge unsuccessfully tried to disuade him, but the attorney insisted he was within his legal rights. Finally the Chief Justice said, "Anyway, you will not take possession *now*. A while ago this man came in and I told him to go home and keep a red hot fire in that stove until spring." "*Necessitas vincit legem.*"

Much of our Law Court work is done in conference. Difficult problems are then discussed. Not always do we agree. Once Justices PATTANGALL and Dunn were distinctly at variance in regard to the law in a certain case. Then said Mr. Justice PATTANGALL to Mr. Justice Dunn, "Let's forget we are judges. Let's put ourselves back to the days of our early acquaintanceship. You be Charles and I'll be Patt." As a consequence, a new draft of a paragraph in the opinion was made by Judge PATTANGALL and read by Judge Dunn, who immediately said, "I will agree to that, *Patt.*"

One of the most famous homicide trials ever held in this State was *State* v. *John Burke,* who was charged with the mur-

der of Nelson Bartley of Jackman Plantation. It was twice tried, resulting first in a disagreement and afterwards is an acquittal. I know of no other case in Maine, although there may be such, in which two eminent lawyers later to become Chief Justices of this Court were opposed to each other in such a trial. The Attorney General was our present Chief Justice Sturgis; chief counsel for the defense was later Chief Justice PATTANGALL. His associate told me that long after the acquittal Burke came into Attorney PATTANGALL'S office in Augusta. The Judge told him that while the State had paid for his per diem services during the trials, yet for three months' preparatory work he had netted only seventy-five dollars. Then he asked Burke if he couldn't pay him something on account. Burke said no, it was absolutely impossible, that he didn't have enough money even to buy a ticket back to Jackman. Then said the kind hearted PATTANGALL, "Well, Jack, I'll be blessed (a very free translation) if I'll work for any man for twenty-five dollars a month." He then gave him his check for seventy-five dollars and balanced the account.

The Chief Justice did much outside the performance of professional duty either as lawyer or judge. At times he owned and operated farms. He had close contacts with businesses of magnitude. Late in life he became engaged in shipbuilding. These things he did largely because of his love of the State. He felt that the young men and women born here should have home jobs and be retained as Maine citizens if possible. Thus would the State grow in population, wealth, and power. While acting as the first president of the Depositors Trust Company of Augusta, with the same thought in mind, he did much to aid home industries, large employers of labor.

In speech-making he excelled. He was a brilliant after-dinner speaker. He made many set addresses. I never heard him make a mediocre speech. There was always something in them outstanding and superior. He had full command of his hearers' emotions and mental reactions. With equal ease and effective-

ness he could evoke tears or provoke laughter almost uncontrollable.

To him constitutional law was sacrosanct. The Federal Constitution in particular was inviolable. If and when amended it should be done by the method therein provided, not by strained judicial construction. It meant not one thing today and quite another tomorrow. It must not be profaned at the behest of some politician who sought a construction to serve his selfish purpose or that of his party.

One of the ablest speeches I think he ever made was a Memorial Day address delivered at Skowhegan on May 30, 1934. It was published and distributed not only in Maine but throughout the nation. I would read a bit from it. In peace time he said:

> "When legislative powers are surrendered to executives who are but too willing to accept them; when the judiciary strive to find reasons for upholding laws enacted at the behest of noisy minorities; when the plain and simple language of Federal and State Constitutions is given new and strange meaning in order to meet assumed existing emergencies; when debasement of the currency is adopted as a sound financial policy; when the sovereignty of the individual States is disregarded and local self-government becomes an obsolete phrase; when individual initiative is discouraged, the lessons of experience cast aside and personal liberty in a great measure becomes a thing of the past; when men are denied the right to buy and sell the products of their labor in the open market place, fixing the prices of the goods in which they deal by bargain with their fellows; when the farmer is forbidden to sow and reap on the land he owns according to his own best judgment; when every detail of the daily business life of the citizen is ordered by officials, not of his choosing; when written agreements cease to have a binding force, even upon gov-

ernment itself—the nation which the Civil War was fought to preserve will have ceased to be.

"Our nation and our state were organized for one great purpose, to secure to the citizens thereof the blessings of liberty. Washington and his soldiers fought in that great cause. Lincoln and the armies of the North maintained the standard which their fathers raised. All that they lived and died for becomes a sad and futile waste if we of this generation are to surrender the heritage they bequeathed us because we lack the courage, the independence, the manliness, to work out our individual salvation but prefer to become paupers to the state, depending upon its bounty to supply our needs."

Mr. Chief Justice Sturgis, to the best of my ability I have truly portrayed the late Chief Justice PATTANGALL as from most intimate association I knew him.

"He was a man, take him for all in all,
I shall not look upon his like again."

Without faith scarcely would life be worth living. Because we have faith and a deep regard for justice, we believe in immortality. The loss of our loved ones causes us to yearn for reunion beyond the grave. It is impossible of belief that our just Creator will deny it.

"Thou wilt not leave us in the dust;
Thou madest man, he knows not why,
He thinks he was not made to die;
And thou hast made him: thou art just."

Chief Justice GUY H. STURGIS then responded for the Court:

MEMBERS OF KENNEBEC AND WASHINGTON COUNTY BAR:

The tributes to the memory of Chief Justice PATTANGALL which you his friends and professional and judicial associates have so graciously presented here this afternoon will be en-

rolled upon the records of this Court as an enduring memorial of our love and respect for a friend and our admiration for the splendid achievements of his distinguished life. You have portrayed all this with becoming fidelity born of intimate knowledge and understanding of the remarkable qualities of heart and mind with which he was so richly endowed and the long teeming years of his life enriched and expanded. The kindly thoughts you have expressed find sincere and heartfelt accord among all the Justices of this Court.

We who served with and under him admired, loved and respected Chief Justice PATTANGALL as you did and deep indeed was our regret when the days of his service were ended. It was a privilege to know him intimately and enjoy the charm of his remarkable personality and the brilliancy of his thoughts and utterances. It was of immeasurable profit to be allowed to take guidance from his abounding knowledge, sound judgment and great wisdom. He was a kindly and lovable associate and a considerate and wise leader. For all this we are sincerely grateful and in the memories of the years of our service together we rejoice.

Deep indeed was our regret when the time came for Judge PATTANGALL to retire from the Bench. We missed the joys of his companionship and were deprived of the benefits of his sage advice and wise counsel, built upon a foundation of knowledge and experience possessed by few men. And now comes the great sorrow of his passing and with all who knew and loved him we mourn and are bereaved. But we rejoice in the glorious achievements of his life and the great public service he rendered, and all the years which may be allotted to us can never dim the luster of his renown or erase his cherished memory.

As he who was most closely associated with Chief Justice PATTANGALL and perhaps knew him best, Judge Hudson has been asked to respond at length for the Court and has done this with greatest fidelity and deepest feeling. He has por-

trayed him as one of Maine's ablest, most distinguished and best loved Chief Justices. This is the epitaph we would inscribe in this record.

The resolutions submitted by the committee of the Bar Associations of which he was a member are gratefully received by the Court and ordered spread upon its records.

And as a mark of our esteem and respect for Chief Justice PATTANGALL this Court will now adjourn for the day.

SCOTT WILSON

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE SUPREME JUDICIAL COURT
SITTING AS A LAW COURT ON JUNE 1, 1943, AT PORTLAND
IN MEMORY OF

HONORABLE SCOTT WILSON

LATE CHIEF JUSTICE OF THE SUPREME JUDICIAL AND SUPERIOR COURTS

Born, January 11, 1870 Died, October 2, 1942

SITTING: STURGIS, C.J., THAXTER, HUDSON, MANSER, MURCHIE, CHAPMAN, JJ.

CHARLES L. HUTCHINSON, ESQ., President of the Cumberland Bar Association addressed the Court as follows:

MAY IT PLEASE THE COURT:

At the request of the Cumberland Bar Association this Court has set aside this hour in order to render a tribute to the memory of Scott Wilson, a former Associate Justice and Chief Justice of this Court, and later a Judge of the United States Circuit Court of Appeals. For a number of years prior to his appointment as Associate Justice he was one of the leaders of this

Bar. Resolutions in his memory have been prepared by a Committee of the Cumberland Bar Association and will now be presented.

HON. LAUREN M. SANBORN speaking for the Cumberland Bar Association then addressed the Court as follows:

MAY IT PLEASE THE COURT:

It is with mingled emotions of deep satisfaction and profound sorrow that I rise to the performance of the task assigned me; satisfaction at being thus permitted to offer my humble tribute of esteem and affection in memory of a college classmate and a devoted personal friend for whose character and attainments my admiration has constantly and consistently increased with the intervening years; and sorrow at being forced to contemplate the mournful fact that the beneficent influence of his genial personal greeting and his wise counsel is no more to be felt otherwise than as a fond memory by those who knew him.

And so I crave your Honors' indulgence while I preface the formal presentation of the resolutions with a brief, if inadequate, encomium upon the life and character of that distinguished jurist whose lamented passing has entailed a substantial loss not only to the civic life of this community but to the administration of justice in the State of Maine and in the Nation as well.

Judge WILSON was born in the neighboring town of Falmouth on January 11, 1870, the son of Nathaniel B. and Loemma Wilson. His early boyhood was spent upon one of the well-cultivated farms of that town, where under the influence of the example of his father and of the precepts religiously instilled into his mind by his mother, of reverence for whose memory he repeatedly gave evidence throughout his entire life, he early formed habits of industry and acquired a char-

acter for integrity which he exemplified to a marked degree throughout his entire career.

Having prepared for college at Nichols Latin School in Lewiston he matriculated at Bates in 1888 where he was graduated in 1892 with first honor in the department of psychology.

In presage of his future calling, he chose as the subject of his part upon graduation, "Law; Its Origin and Aim." During his college course he also excelled in the study of the classics, thoroughly mastering not only the grammar but the literature of both the Latin and the Greek languages, thus acquiring a facility in the use of correct and expressive English not otherwise to be obtained. He was interested in college athletics and active in their promotion, but never at the expense of time and effort due the pursuit of his studies.

After a brief period of teaching immediately following his college years, he became a student of law in the office of the late Judge Joseph W. Symonds in Portland and was duly admitted to this Bar in the month of April 1895 whereupon he engaged in practice in this city, and from the very beginning of his career he so firmly established himself in the confidence of the community that the growth of his clientele was both rapid and substantial.

His first public office was that of City Solicitor of the City of Deering where he had become a resident, which position he held in 1898. He was Assistant County Attorney of Cumberland County in 1901-2 and in 1903-4, Deering having in the meantime been annexed to Portland, he served as City Solicitor of the latter city.

From this well-established beginning, his advance in professional and political circles was rapid and consistent. No matter how involved the legal problem committed to him, he was sure to bring to its resolution, and to the protection of the rights of the client whose interest he might for the time being be serving, that wealth of knowledge and that well-trained power of analysis which required only their zealous application

to the task to insure the desired result; and here again he excelled, for no amount of labor deterred him; the assiduity of his effort always proportioned itself to the demand of the occasion.

An admirable illustration of the qualities just outlined is to be found in the case of *Conant* v. *Jordan,* 107 Maine, 227, in which he represented certain inhabitants of the town of Cape Elizabeth against whom a bill in equity had been brought seeking to enjoin them from fishing and fowling in and about a great pond situated in that town in which the complainants claimed exclusive rights. Preparation of the defense involved exhaustive research into matters bearing upon the issue dating back to the great patent of King James I to the Council of Plymouth in 1620 and the grant from the Plymouth Council to Trelawney and Goodyear in 1631 as well as other patents and grants of the early Colonial period. An important, if not controlling, issue in the case was the construction of the so-called Colonial Ordinance of 1641. An examination of every case both in Maine and in Massachusetts construing or bearing upon the Ordinance had to be examined and digested. Moreover, all the recorded conveyances to be found whether in Cumberland or in York County so far as they related to the premises in question, had to be scrutinized and their effect appraised. Months of research were devoted to the preparation of the case, while interminable survey of legislative enactments and of ancient deeds and plans thus made necessary was had; but the result justified the endeavor, for the Court in an able opinion by Judge Savage unanimously sustained the contention of the defendants and dismissed the bill.

He was Attorney General of the State in 1913-15 and during his incumbency of this office he exercised careful supervision over county attorneys in the matter of making prompt investigation and adequate preparation for prosecution in capital cases.

An event of more than passing historical interest took place during the first months of his service. The Legislature instituted proceedings by address to the Governor for the removal from office of certain sheriffs and county attorneys for alleged dereliction of duty in connection with the enforcement of the laws relating to the possession, transportation and sale of intoxicating liquor. The hearing, held in the hall of the House of Representatives and continuing for seven days, attracted widespread public attention; the officials involved were ably defended by Honorable William R. Pattangall, later Chief Justice of this Court, and Judge Wilson in his then official capacity conducted the prosecution. Precedents were few; the task had to be undertaken with scant opportunity for preparation and the defense was replete with every strategic obstacle at the command of his able opponent; but so resourceful in boldness of attack and quickness of thought was the prosecutor that on the record no excuse could be found for a claim that the resulting removal of the officials was based upon political grounds.

In 1918 he was appointed by Governor Carl E. Milliken to be an Associate Justice of this Court, being advanced to the position of its Chief Justice in 1925. It would be superfluous for me in this presence to enlarge upon or to appraise the services of Judge WILSON as a member of this Court. They are well understood and fully appreciated by each of you. His first opinion was written in *Harry Scott's Case*, a case involving somewhat complicated and hotly contested issues arising under the Workmen's Compensation Act and reported in 117 Maine, 436, an opinion concurred in by all the then sitting justices, and his last opinion, to be found in 128 Maine, 358, disposes of the issues raised in the case of *Hamlin* v. *Bragg* there reported. His opinions cover a period of almost exactly eleven years and are one hundred seventy-eight in number including two dissenting opinions.

Following the primary election held in June 1924, conflicting claims set up by rival candidates for nomination to the office of Governor left the Executive in doubt as to the extent of the authority conferred by statute upon the Governor and Council as a canvassing board and he availed himself of his constitutional privilege, submitting a series of questions to the Justices of this Court. To these questions a majority of the Court gave their answers; but Judge WILSON doubting the soundness of the conclusions upon which these answers were based, returned his own answers materially at variance from those given by the majority of the Court and these he justified in a well-considered and carefully drawn review of former answers of the justices and of the numerous legislative enactments pertinent to the inquiry which, according to his reasoning, would in general restrict the authority of the Governor and Council to ministerial acts and would confer materially less judicial authority than the answers of the majority authorized.

While the majority answers have determined the questions involved, the thesis of Judge WILSON in support of his answers, concurred in by two of his associates, has been regarded with favor by many members of the profession competent to judge.

From his position on this Court he resigned in 1929 to accept an appointment to the United States Circuit Court of Appeals which was accorded him by President Hoover and in which position he served with distinction until obliged to retire because of declining health.

On December 24, 1895 he married Miss Elizabeth M. Bodge of Windham and of this union was born a son, Nathaniel W. Wilson, now on the legal staff of the Central Maine Power Company. Mrs. Wilson died on January 16, 1937 and on March 24, 1938 he married Miss Thelma Cony Dutton of Augusta who survives him.

After a somewhat protracted illness, he passed away on October 22, 1942.

One need have no fear of going beyond the bounds of propriety or the realm of truth in depicting the charming and lovable traits of the man. He was fond of plants, of flowers, of birds, and of all forms of animal and vegetable life. It was one of his chief joys in the love of Nature to commune with her visible forms and to him she spoke a varied language. It was here that he obtained the much needed periods of rest so essential to sustaining the burden of his hard and oft-times protracted labor.

He loved good literature and early became familiar with its best examples. He loved the society of his fellow beings, and if, when engrossed in meditation upon some problem connected with his work, he appeared on occasion to be hardly effusive, it was not because of any lack of appreciation of the value of his friendships, for whenever he could feel free to cast off the burden of labor, he proved himself genial and companionable to the utmost, entering most heartily into the pleasures of conversation and exchange of anecdote.

It is therefore with no tincture of apology that I submit the following resolutions of the Cumberland Bar Association, move their reception, and ask that they be spread upon the records of the Court as a perpetual memorial of a deserving public servant.

RESOLUTIONS

It is with unfeigned sorrow that the Cumberland Bar Association has received intelligence of the death of HONORABLE SCOTT WILSON, who was for many years one of its most active and loyal members, conducting an extensive and arduous practice of law in this, his native county, and who in the latter years by outstanding service both as an Associate Justice and a Chief Justice of the Supreme Judicial Court of Maine and upon the United States Circuit Court of Appeals reflected distinct honor upon the legal profession throughout the State

We take pride in his lifelong exemplification of the highest attributes of personal character and of the noblest traditions of his chosen profession to which he gave continually and without stint of toil and talent.

We remember with satisfaction his interest in community and public affairs and his generous and effective contributions made in their behalf.

Wherefore be it

RESOLVED that we cherish these memories as a rich and abiding heritage such as may be bestowed only by the choicest of spirits.

RESOLVED that in the conviction that such would accord most fully with his wish, could it be made known to us, we seek to emulate his example and to profit by it, continually striving in our relations with our clients and with the public to ascend to a higher and even higher plane of service. And be it further

RESOLVED that these resolutions be tendered to the Supreme Judicial Court for incorporation into its permanent record and that a copy be sent to the family of the deceased.

HON. CHARLES E. GURNEY, President of the Maine State Bar Association then said:

MAY IT PLEASE THE COURT:

Upon the fairest page of the history of this Honorable Court, beside the names of his illustrious predecessors, may it be written for other men of other times, that SCOTT WILSON, former Chief Justice, on the twenty-second day of October, 1942, entered, alone, as all must, the deepening shadows, we, unknowingly call death.

His early life was such as New Englanders love to contemplate: born in a small town, where opportunities were few, he breasted the rigorous winters and knew the long toilsome hours of summer from which came physical strength and a sound mind, comprehending, discerning and alert.

His early education, well founded, easily gave him leadership at college whence he, after a brief period of teaching, entered upon the study of law in the office of Judge Joseph White Symonds of Portland, scholar, jurist and leader of the Maine Bar. Judge WILSON'S dignity of deportment and gentleness of manner may have been enhanced by this association with Judge Symonds who never consciously wounded the feelings of another.

Admitted to the bar in 1895, Mr. WILSON became Associate Justice of this Court in 1918; its Chief Justice in 1925; and Judge of the United States Court of Appeals in 1929.

Indicative of his engrossing interest in the law is the fact that he never held public office except such as were identified with his profession to which he brought devotion, thoroughness and great ability. Significant, too, is the time of his elevation to the Bench. The evolution of the common law had reached the end of an era at about the time of his birth in 1870. During the period then closing, the Puritan influence had been dominant. The Puritan exalted the importance of the individual and the preëminence of human will.

The end of the Civil War turned the thoughts of men from destruction to construction; agricultural economy was fast giving way to an expanding industrial and commercial development. Rural populations were turning to urban settlements. Railroads, the telegraph, the telephone and other inventions were already modifying the former modes of life. The law seemed to stand still and to resist the coming of the new conditions of growth. This may, at least, academically, be only an appearance, for authoritative students of the common law confidently assert it was entirely adequate to deal with problems implicit in the development of the new phase of American life. It is said by one recognized writer that at the time of Henry the Second may be found legal principles ample for dealing with the regulation of public utilities. Blackstone thought the Common Law little short of a state of perfection.

> "At the end of the nineteenth Century," declares Dean Pound, "lawyers thought attempts at conscious improvement to be futile."

The Courts have seldom been enthusiastic promoters of legislation. Numerous essays have appeared in the various law reviews inveighing against legislative interference with established legal principles found in the decisions. This spirit largely contributed to the failure to keep pace, in the minds of the public, with the growing demands of the time. Questions of pleading long obsolete still prevailed. A thing capable of growth does not become static and it may be only in appearance that the growth of the law, in important aspects, was unable to meet the demands of the new industrial and commercial era which the nation had entered.

These controlling legal trends, borrowed from Puritanism, from the time of Lord Coke and through the American era ending with the Civil War, were toward an idealism in conduct, intertwined with moral theses and emphasized, as of supreme importance, the rights and privileges of the individual. Every

man's house was his castle beyond whose threshold even the king, uninvited, might not go. The exertion of the human will and its dignity lay at the foundations of many of these doctrines. But they were obstacles to meeting the needs of the time. A wrongdoer was presumed to do wrong and punishment was for his wrongful intent. The revenge idea prescribed the mode of dealing with the accused and no consideration of heredity or of environmental urge was made.

The overall effect of exalting such concepts was to regard man and not men. Social legislation dealing with groups and classes and establishing rules for their dealing one with another surged around the growing republic but the tenacity and vitality of the common law seemed to inhibit the change requisite for the new economy and the growth of new conditions of life and industry.

> "Let us remember that the high water mark of individualism in American law was reached in the last quarter of the nineteenth century."

The people of the democracy became impatient and resentful at the conduct of railroads and the Granger agitation produced the Interstate Commerce Commission, empowered to deal with railroads. The limitation upon the right to conduct a warehouse connected with the railroad, free from State regulation and interference, was sustained by the United States Supreme Court whose decision rested upon a common law dictum of Lord Hale, manifesting in this way the vitality of common law principles.

The feeling of the people, at the time of this social legislation, was not so much against the law as against its want of application to the conditions they sought to change.

Social legislation, to meet the requirements of the new day, was just starting, or little more than starting, when Judge WILSON was admitted to the bar. These new remedies to ease

the hardships of the earlier doctrines and to give applicability of the law to new conditions, challenged his attention, and he addressed himself to them with his usual thoroughness. He became a member of the American Law Institute engaged in the restatement of the law. His interest in this Association continued during his lifetime. His sense of justice rebelled against such tenets as the assumption of risk and contributory negligence then so persistently applied to injured employees, and preventing a recovery, when the employee himself, in some instances, was free from negligence.

The fellow servant doctrine so often defeating justice by refusing to listen to the cry of a workman injured in the course of his employment and whose redress was prevented upon the theory that he was debarred, by reason of the negligence of a fellow servant whom he had not selected, seemed inconsistent with his conceptions of justice. An analysis of these doctrines, however, showed them to be derived from the underlying principle of freedom of the will on the part of the injured workman. The law said he did not have to work amid dangerous conditions; neither was he obliged to accept employment by the side of incompetent fellow workmen.

Statistics had shown that the majority of industrial accidents had happened at the close of the day when the faculties were perhaps dulled and the workman possibly weary and unable to exercise that unerring action of hand and mind essential to his safety. Judge WILSON'S study of this subject caused him to devote himself to the preparation of legislation to correct the unfair effects of these legal, firmly established tenets. He was among the first in Maine to see the new day.

The Workmen's Compensation Law of this State was largely his contribution to the remedy of these juristic anachronisms. His research into the problem was exhaustive and he had a large part in framing the Workmen's Compensation Law enacted in 1919. His first pronouncement from the Bench, in

the *Scott Case*, 117 Maine, 436, which opinion was dated November 12, 1918, epitomized his understanding of the broad, purposeful enactment:

> "The general purpose of this Act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry in which the accident occurs, through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime."

To his work upon the Bench as well as in the practice of his profession, he brought industry, painstaking effort and self discipline. His opinions from the Bench were couched in language well chosen and of Macauleyan clearness. Stilted phrase and recondite expression were never his. He agreed with another eminent justice of this court that

> "In stating legal propositions, one cannot use language too precise."

In manner he was sincere, but not demonstrative; serious but not severe; he was a good husband and father, a good citizen, indoctrinated with notions of right living, a man of exemplary character, and we are justified today in according him the accolade of service well and faithfully given. How applicable to him is the thought of Thoreau:

> "Did you ever hear of a man who had striven all his life faithfully and singly toward an object and in no measure obtained it? If a man constantly aspires, is he not elevated? Did ever a man try heroism, magnanimity, truth, sincerity and find that there was no advantage in them—that it was a vain endeavor?"

Sorrowfully, we recall today that the curtains of life for him have been drawn but, oftentimes, at the close of day, the sun, retreating before the pursuing night, shoots back his rainbow-hued arrows of light which, blending into a curtain of afterglowing radiance, surpass the splendors of his zenith hour. So, sometimes, the afterglow of a life well spent, exceeds in inspiration and influence the example of the living day. Memory and meditation will reveal enduring qualities whose emulation will enrich our own lives and lead us onward and upward forever.

On behalf of Maine State Bar Association, I take pleasure in seconding the motion concerning Resolutions presented by the Cumberland Bar Association.

LEONARD A. PIERCE, ESQ. was the next speaker and he said:

MAY IT PLEASE THE COURT:

I feel highly honored in being asked to take part in these Memorial Exercises. My only acquaintance with Judge WILSON prior to his appointment to the Court was while I was serving as a member of the 1915 Legislature before which he often appeared as the representative of various clients. His work as legislative counsel was, as one would expect, of the sort which thoroughly justifies such employment. As a new member without any prior legislative experience, I remember gratefully that, while never forgetting his obligation to those who had employed him, he really was "of counsel" to the members of the Legislature; painstaking, clear-thinking, logical and always fair in his presentation of any matter, whether before a formal hearing of a Committee or elsewhere, he really assisted its members.

Before I moved to Portland, he had become a member of the Supreme Court and my professional contacts with him after that time were those of counsel before a judge. Of his services on our Supreme Court, and later as its Chief Justice, it is more appropriate that others than I speak in detail. My acquaintance with the Chief Justices of Maine extends through a long line beginning with Judge Wiswell up to the present time. As we recall their names I do not think we can be accused of provincial partiality in believing that they constitute a list not only of great judges, but of fine citizens, of public servants of which any State might be proud. Comparisons between them, even were one qualified to compare, would be obviously out of place. Nor can we from the Cumberland Bar be accused of partiality in feeling that Judge WILSON, our contribution to that distinguished list of Chief Justices, ranks high among them.

Speaking, however, as one who did not practice with him at the Bar but who has had many occasions to appear before

him both at *nisi prius* terms on the law side, as a Sitting Justice in Equity, in the Law Court, and on the Circuit Court of Appeals, I am very glad to express a personal note for myself, and I am sure for all others similarly situated, not only of our regard for his professional qualifications, but of sincere affection for him personally.

No one of us who has ever had occasion to appear before Judge WILSON in whatever capacity he happened to be sitting, can ever remember of an unkind, discourteous, or sarcastic remark, either in conversation or from the bench, which left its sting behind. Keen and scintillating as were his own mental processes, he was always patient and kindly with those of us who were not so fortunate in grasping quickly the meat of the controversy involved.

In addition to the outstanding brilliancy of his legal attainments, he possessed an untiring energy and interest in his judicial labors. He was a judicial workman who wanted his work to be well done. I remember being engaged in two long, intricate and somewhat tedious hearings before him as Sitting Justice in Equity, and the diligence with which he pursued the complicated legal and factual problems until he arrived at a conclusion. I particularly remember one involving a tremendously involved long-term contract for the sale of standing timber, a business problem with which he could not have had much experience in his own practice, and how counsel on both sides were amazed at the quickness with which he grasped the technical questions involved in the various methods of cruising timber lands utilized by the expert foresters who testified, and the business situations of both parties. While the decision he arrived at did not meet with the entire approval of either litigant, it seemed to all concerned such a sound disposition of the controversy that the case was settled in accordance with his opinion and without appeal by either side to the Law Court.

Off the Bench practically my only contact with him was as a

member of the Fraternity Club, a small literary organization of some twenty-five or thirty men in this city which meets once a week during the winter months at the homes of its members. All of us found him a gracious host, a stimulating conversationalist of wide interests and a charming companion. I recently refreshed my recollection by examining hurriedly some of the bound volumes of its proceedings. I note for instance that on one occasion he delivered a very scholarly paper on the rise of the Ottoman Empire.

As a participant in the discussions which at meetings of that club customarily follow the formal paper, the scope of his information and scholarship was always striking. For example, at a meeting where the works of Chaucer were under discussion, Judge WILSON commented upon Chaucer's poetry, compared it to that of Shakespeare, and in a way which, without in any way verging on the pedantic, showed a real familiarity with the works of both. Continuing with reference to Chaucer, Judge WILSON said that his ideas correspond to some of the views of our own time and show how keenly and accurately he understood human nature. Chaucer's description of a lawyer as one that seems to be true for all time, was quoted by the Judge as follows:

> "No wher so besy a man as he ther was, and yet he seemed besier than he was."

I have transposed the original as best I can into modern English but Judge WILSON gave it correctly in the original.

To some, his manner may have seemed unduly dignified and forbidding, but I am sure that that was only on the surface. Actually, while he was not at all of the hail-fellow, well-met type, he never failed in courtesy and kindly friendliness to all who had occasion to know him. Any contrary impression must be due to his natural and inherent reserve. He told me once in the latter part of his life that he dreaded appearing as a speak-

er, even on semi-formal occasions such as Bar dinners. He said he was out of the habit of speaking and it was a burden for him to prepare. Despite that, I am sure that the recollection of many others will agree with mine, that as an after-dinner speaker he was unusually gifted. I looked the other day at the remarks he made on the 50th Anniversary of this same Fraternity Club, some nineteen years ago. I had remembered them ever since as eminently appropriate and entertaining and my re-reading served only to confirm my recollection. It contains some particularly discerning references to the attainments and charm of members such as Judge Hale, Bishop Brewster, Doctor Albion and Mr. Calvert.

I particularly remember his remarks at a Bar dinner given, I think, when our present Chief Justice was appointed to the Supreme Court. All the older men here can recall that a distinguished group of our citizens made a trip to the summit of Mt. Katahdin. On their return the story became current about the State that our then Governor (known to be of exemplary personal habits) in traversing the famous Knife-Edge of that mountain, had felt the need of stimulant, and that the same had been proferred him by the versatile and distinguished editor of the *Lewiston Journal*. The story, probably apocryphal, caused a good bit of good natured merriment at the time.

Shortly after came the Bar dinner to which I refer and Judge WILSON was asked to respond for the court. He began his remarks by stating that in previous years there had been many convivial traditions attached to the members of our Court, such as Chief Justice Peters, et als, but now times were different, customs and habits of people had changed, the court had to change with them, and the Bar must so recognize. "On the other hand," he continued, "we would not have the members of the Bar believe that the present court has altogether forgotton the traditions of our predecessors. We still have in mind the scriptural adage that at times it is necessary to offer

unto man drink lest he perisheth, a doctrine which we understand has the support of the executive as well as of the judicial branch of the state government." There is an advantage in having a reputation for dignity and almost of austerity, in that when the one possessing that reputation does bring forth a bit of pungent witticism it is all the more appreciated.

Judge WILSON was a real lawyer. He appreciated fully the need for definite forms of procedure and of draftmanship. On the other hand, he had realized that laws and courts, after all, exist for the purpose of doing justice between citizen and citizen or between state and citizen. He had an innate dislike for sharp practice and a corresponding appreciation of integrity.

In preparing a brief on an income tax question I was much struck by his opinion for the Circuit Court of Appeals in the case of *Rice Co., Petitioner* v. *Commissioner,* 41 Fed (2nd) 339. The Riordan Company had requested the Petitioner, a machine company, to delay work on a large machine being built under contract for the Riordan Company. The Petitioner assented but a subsequent rise in the cost of materials for the machine caused a substantial loss to the Petitioner. The Riordan Company voluntarily reimbursed the Petitioner the amout of its loss. In holding that the additional payment did not constitute taxable income to the Petitioner, Judge WILSON said:

> "Here there was clearly no legal obligation on the part of the Riordan Company to make good this loss suffered by the petitioner. All the Petitioner was legally entitled to as gain from its capital invested and labor or both, or from the sale of any capital assets under the contract, it had already received. The additional sum was clearly a pure gratuity given from a sense of fair play in business, an exhibition both commendable and refreshing to find in these days. It was not taxable income within the meaning of the Revenue Act."

As lawyer, attorney general, justice and chief justice of this Court, and justice of the Circuit Court of Appeals, as man and citizen, Judge WILSON has left an enviable record. I am very glad to second the Resolutions presented by the Committee.

HON. GEORGE L. EMERY, Justice of the Superior Court, then spoke as follows:

MAY IT PLEASE THE COURT:

At the request of the Committee of the Cumberland Bar I now arise to participate in this memorial of the Bar to the late Judge SCOTT WILSON.

Judge WILSON had a long and honorable career as a practicing attorney at this Bar, and also as Associate Justice and Chief Justice of the Supreme Judicial Court of Maine. He also served his Country as a Justice of the United States Circuit Court of Appeals.

In the practice of his profession he early acquired fame, and the nature of his practice was such that it aptly fitted him for the public service which he was to render both State and Nation in the years to come.

We who were acquainted with Judge WILSON and his works always knew that in due time he would attain judicial preferment and would serve his State upon the Supreme Bench of Maine.

As a presiding Justice at *nisi prius* Judge WILSON by his temperament and training was exceedingly well qualified to perform the duties required in the trial of civil and criminal cases. Like the judges of the English courts he was the master of the trial, but he never by his conduct displeased the lawyers or parties engaged in such trial. His instructions given to the jury were clear and impartial and of great assistance to the jury in rendering their verdicts. I have in my possession, among other documents which he gave to me, upon my assuming the duties of a Superior Court Justice, a transcribed copy of the instructions given to a jury in Lincoln County in the trial of a criminal case for violation of the statute prohibiting drivers of motor vehicles from operating the same while at all under the

influence of intoxicating liquor. These instructions should be in the hands of every trial Judge in the states where such statutes exist. It is a very clear and able instruction to the jury as to the purpose and intent of this prohibitive act of the legislature.

My recollection goes back many years to the time when he presided in York County at the trial of an important capital case. As counsel for the defense in that case, I have the recollection of the ability and fairness which he exercised during that tedious trial of many days duration, and I remember at the end of this eleven-day trial that the defense had not claimed any exception to the admissibility of testimony, to the rulings on procedure or the instructions to the jury. The learned counsel for the prosecution told me at the end of the trial that if they had the right to claim exceptions there certainly would be no justification in exercising that right. His able services as a *nisi prius* Judge are favorably known to all lawyers who ever practiced before him.

As to the performance of his duties as appellate judge I will briefly call the Bar's attention to two great cases in which he wrote the opinions for the Court. One, *State* v. *Budge,* in which he ably clarified the law as to involuntary manslaughter. The second, the case of *Clark* v. *Morrill* in which he also ably clarified the law as to the right of recovery for deceit and fraud. Our reports contain many cases of his able opinions rendered by him for the Court in various important cases.

While he was serving his State as Chief Justice of the Supreme Judicial Court he received a call from his Country to become a Judge of the United States Circuit Court of Appeals. As to his services rendered with that important tribunal it is not befitting for me to speak, because his achievements will be described in proper exercises before another tribunal.

A man who has been in the service of the public for many years is liable to have his personal character and temperament

obscured by such public service. I wish very briefly to speak of Judge WILSON as a man whom I knew, admired and respected. He was of a retiring disposition, quiet in his conduct with humanity, sincere in all his works, and modest in his deportment. He was not a recluse, as it was sometimes thought because of his conduct, for he loved and was interested in his fellow man, had a keen but quiet sense of humor, loved God's great outdoors, loved his books and was happy in his home life. He was a kind man and very thoughtful of the rights of others. Many charitable organizations in Maine could give testimony as to his benevolence in aiding and assisting under-privileged children and unfortunate citizens of our State. He was not like the Pharisees who rendered their charity in public. He never desired praise or commendation for his good works.

He had expressed an ambition to have a few years left to him in retirement when he could re-read his books and do some writing on legal subjects. But it was not for him to realize his ambition, and in facing grim suffering in the last months of his life he exercised the same fortitude, the same philosophy, the same kindness to those who attended him, which he had exercised in his activities during his entire lifetime.

A few words more and I have finshed. When a noble character has passed on we are prone to consider what were the underlying qualifications which produced such a character. From my personal observation of his works and activities I am satisfied that he was possessed of a judicial temperament, the true definition of which I believe to be absolute moral and mental integrity. He also had the ability and endurance which enabled him to perform prodigious labor. He had the faculty of finding the underlying truth in every case which was committed to him for consideration. He had the ability of being a judge without ceasing to be a human being.

In closing permit me to quote a verse from a poem written by a great Maine lawyer, the late Honorable Orville Dewey

Baker, in memory of another great Chief Justice, the late John A. Peters.

"Justly he lived. Facing, indeed, his truth,
The lie, unspoken, died upon the lip.
On his clear vision no one might impose,
Who sought the law for malice or offence.
Friendships he had, and strong, but yet no man
Who lived, upon that friendship dared presume
For favor, or to gain a wrongful cause.
His gentleness did not o'er shallows run;
Let but injustice raise her front, and then
The sunny depths of his great nature stirred
To awful indignation. All men knew
Intinctively, who in his presence were
Justice, with her white robe, did wrap him round."

CHIEF JUSTICE GUY H. STURGIS responded for the Court:

MEMBERS OF THE CUMBERLAND COUNTY BAR:

It is exceedingly fitting, we think, that you have brought your splendid tributes to the memory of Judge SCOTT WILSON to this Court where he sat so long. We know that there is reverent recognition of the great fame and renown he gained in the Circuit Court of Appeals of the United States, and in that we rejoice. But here today we claim him as our own and record the achievements and successes of his professional career and our grateful appreciation of the splendid services he rendered on this Court, that it may be truly said of him he had "honour in his own country and in his own house."

It was at this Bar that he began his professional career and immediately establishing a reputation for great ability and learning and of far more importance, for absolute integrity, he soon became throughout this State recognized as one of the outstanding lawyers of his generation to whom a brilliant future was assured. He was a successful trial lawyer and a wise counsellor and with justifiable confidence clients entrusted to him matters of greatest importance and he guided them faithfully and well. As has been related, he was Counsel of the Cities in which he lived, a Prosecuting Officer of this County and the Attorney General of the State. That his service in all these important offices enhanced to the highest degree the splendid reputation as a lawyer he already enjoyed needs no assurance here.

This was the man tried and tempered in the school of long and broad experience, scholarly and learned, temperate and just, honest and fearless, who, on August 7, 1918, the Honorable Carl E. Milliken, Governor of Maine, appointed an Associate Justice of the Supreme Judicial Court. That was the season when Death struck sharp upon the Court, the changes among its members were many and in the year four new As-

sociate Justices were appointed. In the order of their elevation they were Justices Charles J. Dunn of Orono, John A. Morrill of Auburn, SCOTT WILSON of Portland and Luere B. Deasy of Bar Harbor and they with Chief Justice Leslie C. Cornish of Augusta and Associate Justices Albert M. Spear of Gardiner, George M. Hanson of Calais and Warren C. Philbrook of Waterville, constituted the reorganized Court of that period. Need I say that no man ever entered a more impressive and inspiring judicial environment and association or where to maintain an equality of accomplishment and as he did, to excel, required a more resolute purpose, more untiring industry, more excellence of judgment and greater learning in the law. We know that he fully met these demands and at once proved himself a great Judge among great Judges and the peer of them all.

He presided at *nisi prius* in all the Counties of the State and in some of the most important civil and criminal cases tried in our Courts, and in all of them, no matter how long they continued, how turbulent the incidents of the trials grew or how serious the problems which arose, apparently unruffled and unperturbed the calm of his demeanor and action never wavered and his patience was without end. Inspired by his precept and example the courtroom of his trials were models of decorum and propriety. His rulings were prompt and firm and rarely set aside. His impartiality was proverbial. A master of English, his charges to the jury were concise, correct and convincing, and marked by a clarity of thought and directness of expression which presented the issues of fact and law in simple and understandable terms which jurors could readily assimilate and understand. A misconception of the law of the cases by a jury was unknown in his Court. He was excelled by few as a Trial Judge.

The place of his most eminent and valuable service on the Bench of this State, however, was in the appellate work which

in the days of his office went hand and hand with the trial of cases at law and in equity. A serious and scholarly man, inclined to reserve rather than to sociability, to him the hours he could spend alone in his Chambers analyzing, studying and solving the problems before him for review, seemed to be the acme of his contentment and satisfaction. Until the facts in a case were weighed with meticulous care and adjusted according to their true import and proper relations and painstaking and thorough research had exhausted the authorities to be found he toiled early and late that the accuracy and integrity of his decisions should be unassailable. His opinions, written in chosen phraseology, and unmarred by pedantic effusions or metaphorical excesses, portrayed his understanding of men and their affairs, his remarkable judgment, the breadth of his thought and reasoning power, his industry and learning and that deep sense of justice which directed his every judicial act. The many opinions which bear his name in this Court, one hundred and seventy-eight in all, are models of literary excellence, logical and sound reasoning and legal conclusions of unimpeachable verity. They are among the imperishable monuments which he erected along the path of his judicial career.

On March 1, 1924, Judge WILSON was made Chief Justice of the Supreme Judicial Court of Maine and remained in that office until October 7, 1929, when he resigned to enter another and broader judicial field. During that period his service upon the Bench was of the same high order except as the longer years of his study and experience had magnified his learning and wisdom and added to his judicial stature. In the administration of this office his courtesy, kindness and generosity endeared him to his Associates and their admiration, respect and regard for him was unbounded.

In the last years of his stay as Chief Justice he arranged a reorganization of the higher Courts of this State. Ably and generously assisted by some of the other Justices of the Supreme Judicial and Superior Courts, a Committee of the Legislature

and many interested Members of the Bar, he, I believe, more than any other man caused to be enacted into the law legislation which did away with the antiquated judicial system which had existed in the main for more than a century. A Superior Court of general jurisdiction was erected upon the foundation of the four County Superior Courts then existing and to this was entrusted the trial of cases throughout the State. The Supreme Judicial Court, although it retained its jurisdiction in equity and over many extraordinary remedies, became in effect only an Appellate Court and to its trial jurisdiction, finis was written. It is not profitable to dwell at length on this change. To this undertaking he gave the best of his ability, his vision and his understanding and the structure which he helped to erect, to his deep satisfaction has proved worthy of the hopes and aspirations which prompted his assumption of the burdens of this worthy but onerous endeavor. He saw his handiwork reach the day of its conclusion but it was not his to take part in or supervise its operation. That fell to the lot of those that came after him.

For, at the very zenith of his career on this Bench, with much work yet to be done and greater honors to be gained, standing in the annals of this Court as one of the greatest Chief Justices of all time, came a call to service in the Circuit Court of Appeals of the Nation. That he deserved and was worthy of this preferment no one will gainsay. That he was needed here no one can deny, but he was needed there and it was ours to sacrifice to the greater good. His paths were in the new field and ours did not follow, but the memory of the long and happy years of our companionship and associated service and the impress of his splendid character, lofty ideals, and great learning and wisdom, Time can never efface.

That the luster of the fame and renown he gained here at home at the Bar and on this Court, may never be dimmed and your words of praise and kindly thought extolling his life and its achievements may never be forgotten, the resolutions and

addresses which you have presented will be inscribed at length on the pages of the Reports of this Court. As a mark of honor and respect for the memory of Chief Justice WILSON this Court will now adjourn.

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Wilson v. *Wilson*, 250.

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Atherton v. *Crandlemire et al.*, 28.

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Beane v. *Hartford*, 62.

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In determining whether a judgment rendered in an action for assault and battery was released by the judgment debtor's discharge in bankruptcy, it was not error for the trial judge to rely on the record of the assault and battery case and not examine the evidence, as there was no ambiguity as to the cause of action nor doubt as to the issue necessarily involved there and actually decided. On that issue the judgment was conclusive.

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The tax upon a trust and banking company provided by Revised Statutes, Chapter 12, Section 72-75 as modified by P. L. 1931, c. 216, is an excise laid upon the value of the franchise of the bank when the tax is assessed, that is, a franchise tax upon its capacity to transact its business and enjoy the privileges granted by its charter.

One-half of the tax is assessable as of the fifteenth day of May and one-half as of the fifteenth day of November of each year and then only becomes a debt of the bank.

If returns are made by a domestic incorporated trust and banking company as required, the semi-annual assessments of its tax under the statute are upon the value of its franchise as of the fifteenth days of May and November of the current year, measured by the average of its deposits less allowable deductions for the six months ending on and including the preceding last Saturdays of March and September.

If returns are not made by such a bank the tax provided by the statute is assessable, one-half as of the fifteenth day of May and one-half as of the fifteenth day of November upon the value of its franchise on those days as fixed by the Bureau of Taxation.

Under R. S., c. 12, §§ 72-75, as modified, the tax upon a domestic incorporated trust and banking company is not assessable as of the dates when returns are or should be made by the bank.

The liquidation of the Fidelity Trust Company through a conservator was authorized by the Emergency Banking Act, P. L. 1933, c. 93, and the conservator was governed by the general rules applicable to receivers of trust and banking companies.

While the appointment of the conservator did not work a dissolution of the Fidelity Trust Company, when pursuant to decretal orders he took possession of its properties and facilities, ousted its officers from its quarters and the control and management of its business and began final liquidation, the bank was deprived of its right and power to exercise the privilege of doing business under its franchise.

A trust and banking company is not subject to the tax provided by R. S., c. 12, §§ 72-75 where it has no right nor power to exercise its

franchise and the franchise is not in fact being exercised by anyone in its behalf and interest when the tax is assessed even though there is a legal possibility that its corporate functions may be resumed.

When the franchise tax claimed was assessed, the Fidelity Trust Company had been deprived of its right and privilege to exercise its franchise and, as there was then no foundation upon which the tax could rest, it is invalid and cannot be allowed.

Robinson, Bank Commissioner, v. *Fidelity Trust Company,* 302.

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The defendant had the burden of establishing by clear and convincing proof that her signature on each of the notes sued upon was obtained by fraud.

Herman v. *Green et al.,* 54.

Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser and if the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties. R. S. 1930, Chapter 164, Section 64.

A holder in due course is a holder who has taken the instrument under the following conditions (1) that it is complete and regular upon its face; that (2) he became the holder of it before it was overdue and without notice that it was previously dishonored if such is the fact; that (3) he took it in good faith and for value; and (4) that, at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

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Although mistake by one party to a contract might be ground for rescission or refusal of specific performance, it cannot be a ground for alteration of the terms thereof.

Tozier v. *Pepin*, 92.

An agreement by an employee as a part of his contract of employment that he will not engage in competition with his employer after the termination of the employment may be enforced in equity if it is reasonable under the circumstances.

To fall within this rule, however, the agreement must impose no undue hardship upon the employee and be no wider in its scope than is reasonably necessary for the protection of the business of the employer.

Roy v. *Bolduc*, 103.

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Even though plaintiffs Burton Gay and Harry A. Gay might have been right as to their contentions that there were errors in the admission of testimony and the refusal of the presiding justice to give requested instructions, the fact established to the satisfaction of the Court that the plaintiff, Burton Gay was guilty of contributory negligence, barred their right to recover.

Gay v. *Hartford*, 62.

Careless inattention on the part of the plaintiff was a contributory proximate cause of the damages sustained by him; and his failure to sustain the burden of proof that he himself was exercising due care defeated his right to recover.

Baker v. *Transportation Co.*, 190.

To sustain a finding that the decedent was guilty of contributory negligence and to rebut the presumption of due care on the part of the decedent it must be shown that there was evidence of probative value that the defendant had sustained the burden of proof of such alleged contributory negligence.

Ramsdell v. *Burke*, 244.

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The single question before the Court was whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore declaring by their verdict, that the respondent was guilty as charged.

A remark by a trial judge that going into too many details should be avoided is not prejudicial to a respondent.

State v. *Smith and Poirier*, 44.

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Wilson v. *Wilson*, 250.

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EMPLOYER AND EMPLOYEE.

While an employer is not an insurer that the place where his employees are required to work is a safe one and is required only to use due care to furnish a reasonably safe place of work, it has been long established that he is required to warn his employees of hazards incidental to their work which are known to him and neither apparent nor known to his employees, and there is no sound basis for refusal to apply these principles of law, applicable to damage suffered at a particular time by reason of a defect in machinery, to the effects of an occupational disease contracted by handling materials of a deleterious nature over an interval of time.

Spence v. Bath Iron Works Corporation, 287.

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A personal injury to be compensable under the Workmen's Compensation Act of this State must be by accident arising out of and in the course of the employment.

An injury by accident arises out of the employment when it is due to a risk of the employment and it occurs in the course of the employment when the employee is carrying on the work which he is called upon to perform or something incidental to it.

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The administrator d. b. n. c. t. a. had the power to compromise and release the obligation of the defendant upon the note he owed the estate, and the compromise made in good faith was binding upon the parties.

Fortin v. *Fortin*, 25.

Where an executor's personal interests conflict with those of the estate, it is the duty of the executor to serve it with the same fidelity that one who has no conflicting interests would serve it.

An executor is deemed unsuitable when he has any conflicting personal interest which prevents him from doing his official duty, and may be removed.

Where a bailee has possession of bonds that belonged to a testatrix and qualifies as executor of her estate, he can not rightfully retain individual possession of them until a demand be made for their return, unless his right so to do is determined in proper proceedings.

One who voluntarily accepts an appointment as executor is estopped from treating his own indebtedness other than as an asset of the estate.

He must yield all controversy as to the debt due from himself and treat it as an asset of the estate.

Where a demand by an executor is necessary, he can not set up that no demand was made on him.

He may not be permitted to determine a controversy between himself as executor and himself as an individual.

An estate should be safeguarded against all conflicting, unadjudicated claims presented by an executor.

Qualification as executor estops him to deny the right of the estate to have immediate possession of property belonging to the estate, and he is duty bound to deliver such property to the legal representative of the estate, where his right to hold the same has not been judicially determined.

State v. *Smith*, 255.

EXPERT OPINION.

A qualified expert is not privileged to present opinion evidence as to the state of public knowledge concerning his specialty.

Spence v. *Bath Iron Works Corporation*, 287.

FACTUAL QUESTIONS.

Questions of fact are for jury determination. The finding of jurors which has support in competent testimony should not be disturbed.

Libby v. *Heikkinen*, 23.

Factual findings by a jury that plaintiff's position on the highway did not constitute negligence and that separate negligent acts of the defendants operated proximately to cause of the damage to the plaintiff are conclusive when they have support in testimony.

Atherton v. *Crandlemire*, 28.

The law is established that the decision of a justice of the Supreme Court, sitting in equity, in so far as it is based upon the determination of factual issues, should not be reversed unless clearly wrong.

Tozier v. *Pepin*, 92.

FORCIBLE ENTRY AND DETAINER.

The action of forcible entry and detainer cannot be maintained by the alienee of property against a tenant at will of the former owner as a disseizor without notice to the tenant of the alienation, or knowledge of the same by the tenant.

The plaintiff in an action in forcible entry and detainer must bring his case within the statute and within the allegations of his declaration.

It is necessary to distinguish between the statutory notice necessary to terminate a tenancy by will of the parties and a notice to the tenant after the termination of the tenancy by operation of law.

GUARDIANS.

HIGHWAYS.

INDICTMENT.

INFERENCES.

INTOXICATING LIQUOR.

JUDICIAL DISCRETION.

JUDGMENTS.

JUDGMENT DEBTOR.

JURISDICTION.

JURY.

The credence to be given to witnesses, the resolving of conflicts in testimony and the weight to be given to it are all matters for the jury to settle.

The single question before the Court, in the instant case was whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore declaring by their verdict that the respondents were guilty as charged.

State v. *Smith et al.*, 44.

The question before the Court, therefore, was whether the findings of the jury were clearly and manifestly wrong; and it appearing to the Court that the testimony of the defendant was incredible and that the evidence failed to show fraud, it was held that the verdicts of the jury in favor of the defendant were clearly and manifestly wrong.

Herman v. *Greene et al.*, 54.

LEGISLATURE, POWERS OF.

The Legislature has the power to alter as well as enact statutes with respect to paupers, their settlement and the liability of towns to provide for them.

It is within the power of the Legislature to make orders and resolutions without any purpose or intention to abrogate, annul or repeal any existing general law.

City of Bangor v. *Inhabitants of Etna*, 85.

LICENSE TO SELL SPIRITOUS AND VINOUS LIQUORS.

See State Liquor Commission.

LIQUOR COMMISSION.

See State Liquor Commission.

MASTER AND SERVANT.

MOTION FOR NEW TRIAL.

MUNICIPAL CORPORATION.

NEGLIGENCE.

NOTICE OF CLAIMS.

OCCUPATIONAL DISEASE.

PARTITION.

is a dispute, nor even that the parties are not in agreement as to their rights. There must be that uncertainty as to the facts or law that warrants submission to a jury or other legal tribunal for decision.

Roukos, Appellant, 183.

PAUPERS.

When supplies are furnished to a pauper, one notice by the town furnishing them authorizes recovery from the town chargeable for a period commencing three months before the notice and ending at the date of the writ, provided suit is seasonably brought.

Payment by the town chargeable of a bill for a portion of the expense incurred in the support of a pauper and the later billing of the balance does not change the rule so long as no action was instituted to collect the earlier bill.

Inhabitants of Sanford v. *Inhabitants of Hartland,* 66.

A person who has a pauper settlement in a town can acquire a new settlement in another town only by having his home in such other town for five successive years without receiving supplies as a pauper. R. S. 1930, Chapter 33, Section 1, Subdivision VI.

The Legislature has the power to alter as well as enact statutes with respect to paupers, their settlement and the liability of towns to provide for them.

City of Bangor v. *Inhabitants of Etna,* 85.

Towns have no vested rights in pauper settlement.

Chapter 203, Public Laws 1933, changed the previous laws of settlement and controls where pauper relief has been furnished subsequent to its passage.

Inhabitants of Mercer v. *Inhabitants of Anson,* 214.

PLEADING AND PRACTICE.

After a case has been remanded for correction of the bill of exceptions and re-entered, a motion to dismiss the bill of exceptions for insufficiency, filed at the time of review must be dismissed.

Fortin v. *Fortin*, 25.

When the respondent takes no exception but relies upon a motion, the appellate court will not order a new trial under any circumstances when the verdict is manifestly just.

State v. *Alquist*, 79.

Whenever by express agreement or necessary implication the cause is to be retained on the docket until the arbitration is perfected by an award, there will be no discontinuance of the pending cause by reason of mere submission to arbitration.

Where the defendant files a motion to permit the filing of pleadings and specifications and there is a hearing on such motion together with a hearing on plaintiff's motion for default, the allowance of the motion for default denies in fact the defendant's motion, although there is no direct denial of the defendant's motion.

Lebel v. *Cyr*, 98.

Probate Courts are creatures of statute and not of common law and have a special and limited jurisdiction. They have no jurisdiction, no powers, no modes of procedure or practice except such as are derived from the provisions of the statutes. The record of their proceedings must show their jurisdiction. The preliminary requisites and the course of proceedings prescribed by law must be complied with or jurisdiction does not attach.

Chapter 75, Section 48, R. S. 1930, authorizes the adoption of rules of practice for orderly procedure and of probate forms, which thereby become official and which are declared to be in force in all courts of probate.

Waitt, Appellant, 109.

PRESUMPTIONS.

The statute, R. S. 1930, Chapter 96, Section 50, by explicit terms creates a presumption of due care by a deceased person at the time of all acts in any way related to his death or injury, which makes a prima facie case for the plaintiff bringing action for damages for the death of such deceased person with respect to the decedent's due care.

Ramsdell v. *Burke*, 244.

PRINCIPAL AND AGENT.

See Agency.

PROBATE COURTS.

Probate Courts are creatures of statute and not of common law and have a special and limited jurisdiction. They have no jurisdiction, no powers, no modes of procedure or practice except such as are derived from the provisions of the statutes. The record of their proceedings must show their jurisdiction. The preliminary requisites and the course of proceedings prescribed by law must be complied with or jurisdiction does not attach.

Chapter 75, Section 48, R. S. 1930, authorizes the adoption of rules of practice for orderly procedure and of probate forms, which thereby become official and which are declared to be in force in all courts of probate.

A probate judge may act upon the petition of those interested or upon personal knowledge derived from the official conduct of the guardian as disclosed in the records of the court.

Waitt, Appellant, 109.

REFERENCE AND REFEREES.

The credibility of the several parts of the evidence and the reconcilement of the conflicts were for the referees to determine.

Evidence as to conflicting methods for determining the cord measurement of wood was admissible to prove and explain the specified item in the account to which it related.

McKenzie v. *Edwards*, 33.

When the findings of fact by the referee has the support of credible evidence, his decision is final.

City of Bangor v. *Inhabitants of Etna*, 85.

References of causes may be by rule of court or otherwise. When not by rule of court, either party to the submission may revoke the reference.

Upon hearing and for good cause the Court may rescind a rule of reference and dispose of the cause in some other way.

Where the rule of reference is sought to be withdrawn, the Court should act in the exercise of proper discretion and within the bounds of justice.

To the decision of the Court recalling such reference there is a right of exception only when there is an abuse of discretion and the burden to prove such rests upon him who alleges it.

Lebel v. *Cyr*, 98.

Findings of fact by a referee are final only if there is any evidence of probative value to support the finding.

Ramsdell v. *Burke*, 244.

REFORMATION OF INSTRUMENTS.

When parties to a trade have variant understandings of it, relief should take the form of cancellation rather than reformation.

Tozier v. *Pepin*, 92.

RESCISSION OF CONTRACT.

Although mistake by one party to a contract might be ground for rescission or refusal of specific performance, it cannot be a ground for alteration of the terms thereof.

Tozier v. *Pepin*, 92.

RESTRICTIONS IN TRADE AGREEMENTS.

See Trade Agreements.

RES IPSA LOQUITER.

The gist of *res ipsa loquiter* is that the unexplained accident under the particular circumstances warrants an inference of negligence. But this inference may be rebutted by establishment by the defendant that he did his full duty under the circumstances to guard against it.

The rule does not apply if the accident was caused by a defect in an instrumentality not discoverable on reasonable inspection and for which defect the defendant was not responsible, even though such instrumentality may have been in use by the defendant and under its control.

Great Atlantic and Pacific Tea Co. v. *Kennebec Water District*, 166.

REVIEW.

"A review may be granted in any case where it appears that through fraud, accident, mistake, or misfortune, justice has not been done and that a further hearing would be just and equitable, if a petition therefor is presented to the Court within six years after judgment." R. S. 1930, Chapter 103, Section 1, Par. VII.

Richards v. *Libby*, 38.

The Law Court has in certain cases reviewed questions of law both on a motion for a new trial and on appeal, even though exceptions were not taken . . .

Such review, however, is not compatible with best practice, and although there be error in an instruction, when no exception is taken, a new trial either on appeal or motion should not be granted unless error in law was highly prejudicial and well calculated to result in injustice, or injustice would otherwise inevitably result, or the instruction was so plainly wrong and the point involved so vital that the verdict must have been based upon a misconception of the law, or when it is apparent from a review of all the record that a party has not had that impartial trial to which under the law he is entitled.

State v. *Smith*, 255.

STARE DECISIS.

The decisions of our highest tribunals are the only authority for the greatest part of our law. Nothing can more tend to shake public confidence in its stability than a disregard by the court of its previous adjudications. Unless we adhere to previous adjudications, we have nothing but oscillations in our decisions; and litigants can have no certainty that the law of yesterday will be the law of tomorrow.

Wilson v. *Wilson*, 250.

STATE LIQUOR COMMISSION.

Bonds required of hotels, clubs and restaurants for a license to sell spiritous and vinous liquors are, by statute, conditioned for the faithful observance of all the laws of the State of Maine, and the rules and regulations pursuant thereto, relating to spiritous and vinous liquors; and liability does not depend on a violation of a rule or regulation of the State Liquor Commission and a revocation of such license by the Commission for such violation.

State v. *Fitzgerald et al.*, 314.

In an action on the bond for a license to sell spiritous and vinous liquors, the State must prove a breach of the condition of it; and the finding of the State Liquor Commission as to a violation of law is not only not controlling on the question of a breach but is not even evidence of such breach.

State v. *Belvedere Hotel Corporation et al.*, 319.

STATUTES.

It is necessary to distinguish between the statutory notice necessary to terminate a tenancy by will of the parties and a notice to the tenant after the termination of the tenancy by operation of law.

If a term used in the statute has a legal meaning, it is presumed that the legislature attached that meaning to it.

A termination of a tenancy at will by alienation of the premises is by operation of law, and not by will of the parties.

The plaintiff in an action in forcible entry and detainer must bring his case within the statute and within the allegations of his declaration.

Sweeney v. *Dahl*, 133.

The purpose of Section 61 of Chapter 124, R. S. 1930, was merely to lay down a procedure by which, after the discharge of the debtor from custody, the original execution, or an alias execution, might be

SUBROGATION.

Subrogation is the substitution of one person in the place of another. It may arise by contract or by operation of law.

The right of subrogation is not restricted to the remedies which the creditor had against the principal debtor, but extends to all the remedies which he had against the principal and others liable for the debt. In the instant case, the makers of the note, by burning the property on which there was insurance to cover its value, did not thereby secure immunity from payment of their note. Neither did the defendant who indorsed for their accommodation. Though technically an irregular indorser, as defined in R. S., c. 164, §64, and entitled to demand a notice of dishonor, which was given in this case, he is an indorser with all that term implies and as defined in R. S., c. 164, §66.

Home Insurance Co. v. *Bishop*, 72.

SURPLUSAGE.

Language written upon a verdict in an attempt to apportion damages between two defendants is surplusage and does not impair the validity of the general verdict.

Atherton v. *Crandlemire et al.*, 28.

TAXATION.

No tax exemption law is needed for any public property held as such. To entitle it to exemption, however, it must be public in its nature.

Greaves v. *Houlton Water Company*, 158.

The tax upon a trust and banking company provided by Revised Statutes, Chapter 12, Sections 72-75 as modified by P. L. 1931, c. 216, is an excise laid upon the value of the franchise of the bank when the tax is assessed, that is, a franchise tax upon its capacity to transact its business and enjoy the privileges granted by its charter.

TECHNICALITIES.

TRADE AGREEMENTS.

TRUSTS.

WILLS.

WORKMEN'S COMPENSATION ACT.

An injury by accident arises out of the employment when it is due to a risk of the employment and it occurs in the course of the employment when the employee is carrying on the work which he is called upon to perform or something incidental to it.

An accident cannot arise out of the employment if it does not take place in the course of it.

If an injury results to an employee from his doing something his employment neither required nor expected or in a place where his employment did not take him it cannot be said to arise out of the employment.

But contributory negligence on the part of an employee does not necessarily bar his right to compensation and even if an employee while acting in the scope of his employment performs his duties recklessly and knowingly exposes himself to danger, unless the injury can be said to have been inflicted by willful intention, the manner in which he does his work may be deemed to be a risk incidental to the employment and the injury received compensable.

The finding by the Industrial Accident Commission that the employee's injury arose out of and in the course of his employment was based on evidence of probative value.

Bennett's Case, 49.

The Commission, under the Workmen's Compensation Act, is the trier of facts and its findings thereof, whether for or against the claimant, are final, but in arriving at its conclusions it must be guided by legal principles. The authority of the Law Court is limited to questions of law. If the Commission commits an error of law, it is the function of the Court to correct such error. For this purpose the Court will examine the evidence set forth in the record.

Before the Commission, the burden of proof is upon the claimant to establish the contention upon the issue raised, by a fair preponderance of the evidence.

When there is competent evidence in favor of the claimant and of the defendant, respectively, whether the claimant has sustained the burden of proof is a question of fact for the determination of the Commission and its findings cannot be disturbed.

Robitailles' Case, 121.

APPENDIX

CONSTITUTIONS AND STATUTES CITED, CONSTRUED, ETC.

UNITED STATES CODE, ANNOTATED.

CONSTITUTION OF MAINE.

REVISED STATUTES.

STATUTES OF MAINE.

PRIVATE AND SPECIAL LAWS OF MAINE.

RESOLVES.

RULES OF COURT.